Y4. J 89/2: M35/3

MARSHALS SERVICE FEES, WITNESS FEES AND AMENDMENTS TO THE JURY SELECTION AND SERVICE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 2016

UNITED STATES MARSHALS FEES

S. 2049

WITNESS FEES AND ALLOWANCES

AND ON

S. 2072, S. 2074, and S. 2075

TO AMEND THE JURY SELECTION AND SERVICE ACT

SEPTEMBER 26, 1977

Printed for the use of the Committee on the Judiciary

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ON DEPOSIT MAR 10 1978

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MARSHALS SERVICE FEES, WITNESS FEES AND AMENDMENTS TO THE JURY SELECTION AND SERVICE ACT

MONDAY, SEPTEMBER 26, 1977

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 2228, Dirksen Senate Office Building, Senator Dennis DeConcini [chairman of the subcommittee] presiding.

Present: Senator Wallop.

Staff present: Romano Romani, staff director; Robert E. Feidler, counsel; Michael J. Altier, deputy counsel; and Kathryn M. Coulter, chief clerk.

Senator DECONCINI. The Subcommittee on Improvements in Judicial Machinery will come to order.

Today we are holding a hearing on five bills: S. 2016, S. 2049, S. 2072, S. 2074, and S. 2075.

S. 2016 allows the Attorney General to modify fees now set by law for the service of process by the U.S. Marshals Service.

S. 2049 increases the witness attendance fee from $20 to $30 per day and provides witnesses with more equitable travel and subsistence allowances.

S. 2072, S. 2074, and S. 2075 relate to the operations of the Federal jury system. Specifically, S. 2072 eliminates the blanket mileage excuse for potential jurors and makes an excuse on the basis of distance contingent upon a case-by-case review before a judge upon a showing of hardship.

S. 2074 provides for a six-person jury in civil cases, reduces the number of peremptory challenges available to each party from three to two, establishes a presumption that the use of voter lists as a source of jury names is consistent with the requirement that juries be selected at random from a fair cross section of the community, clarifies the situation in which those convicted of crimes may serve as jurors, and extends the Federal Employees' Compensation Act coverage to all persons serving as jurors in the district courts.

S. 2075 amends in its entirety the jury fee section of the Jury Selection and Service Act of 1968; provides for a civil penalty against an employer who discharges or coerces an employee as a result of an employee's jury service or summons to service; and sets forth provisions dealing with an employee's right to reinstatement after serving on jury duty.

I would like to welcome today's witnesses: Mr. Carl H. Imlay, Mr. William R. Burchill, Jr., Dr. Jay Schulman, Mr. David Kairys, Mr. Kevin D. Rooney, Mr. William H. Russell, and Mr. John Beal.

Mr. Imlay is the General Counsel of the Administrative Office of the U.S. Courts. He will be accompanied by Mr. William Burchill, Jr., Associate Counsel of the Administrative Office.

Dr. Schulman and Mr. Kairys represent the national jury project. Dr. Schulman, a founder of the project which is a nonprofit organization, directs the project's office in New York City. Mr. Kairys is in private practice in Philadelphia and has worked closely with the national jury project.

Mr. Kevin D. Rooney, Assistant Attorney General for Administration at the Department of Justice, will testify and is accompanied by Mr. William H. Russell, Assistant Director for Administration, U.S. Marshals Service, and Mr. John Beal, attorney-adviser with the Department's Office for Improvements in the Administration of Justice.

I would like to thank each of the witnesses for consenting to be with us today. Gentlemen, we appreciate your taking the time from your busy schedules.

Before we begin testimony, I would ask that the five bills be included at this point in the record.

[Material follows:]

95TH CONGRESS
1ST SESSION

S. 2016

IN THE SENATE OF THE UNITED STATES

AUGUST 4 (legislative day, JULY 19), 1977

Mr. DECONCINI (for himself and Mr. WALLOP) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish fees for services performed by United States marshals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1921 of title 28, United States Code, is amended to read as follows:

"The United States marshals shall collect and tax as costs fees for the following:

"Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, capias, or any other writ, order, or process in any case or proceeding;

"Serving a subpena or summons for a witness or appraiser;

"Forwarding any writ, order, or process to another judicial district for service;

"The preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale;

"The keeping of property attached (including boats, vessels, or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate for each deputy marshal required for special services, such as guarding, inventorying, moving, and so forth. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded;

"Copies of writs or other papers furnished at the request of any party;

"Necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service endeavor shall be collected and taxed by the marshal; or, where two or more services or endeavors, or where an endeavor and a service, are

made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding thereto any additional mileage traveled in serving or endeavoring to serve in behalf of that party. When two or more writs of any kind, required to be served in behalf of the same party, on the same person, in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected;

"The fees to be collected and taxed for the above shall be prescribed from time to time by regulation by the Attorney General;

"For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paping over money, commissions of 3 per centum on the first $1,000 collected and 1½ per centum on the excess of any sum over $1,000 shall be charged by United States marshals. If not disposed of by marshal's sale, the commission shall be in such amount as may be allowed by the court. In all cases in which the vessel or other property is sold by a public auctioneer, or by some party other than the marshal or his deputy, the commission herein authorized to be paid to the marshal shall be reduced by the amount paid to said auctioneer or other party;

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"For all services in a criminal case except for the summoning of witnesses, the United States marshals shall collect and tax a sum to be fixed by the court;

"The marshal may require a deposit to cover all fees and expenses herein prescribed.".

95TH CONGRESS
1ST SESSION

S. 2049

IN THE SENATE OF THE UNITED STATES

AUGUST 5 (legislative day, JULY 19), 1977

Mr. DECONCINI (for himself and Mr. WALLOP) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish fees and allow per diem and mileage expenses for witnesses before United States courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1821 of title 28, United States Code, is amended to read as follows:

"§ 1821. Per diem and mileage generally; subsistence

"(a) A witness in attendance at any court of the United States, or before a United States magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States shall receive the fees and allowances which this section provides, except as otherwise provided by law. The phrase 'any court of the

United States' shall include, in addition to the courts of the United States listed in section 451, the district courts for the Canal Zone, Guam, and the Virgin Islands. An alien who has been paroled into the United States for prosecution, pursuant to section 212 (d) (5) of the Immigration and Nationality Act (8 U.S.C. 1182 (d) (5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242 (b) of the Act (8 U.S.C. 1252 (b)) to be deportable shall be ineligible to receive the fees or allowances which this section provides.

"(b) Witnesses shall receive $30 for each day's attendance which includes time necessarily occupied in going to and returning from the place of attendance.

"(c) Witnesses shall receive compensation for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distances actually and necessarily traveled. Witnesses who travel by common carrier shall receive the costs of transportation at the most economical rate available. A receipt or other evidence of actual cost shall be furnished. Witnesses who travel by privately owned vehicle (automobile, airplane, or motorcycle) shall receive a travel allowance equal to the mileage allowance which the Administrator of General Services prescribes pursuant to section 5704 of title 5, United States

Code, for official travel by employees of the Government. Computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Administrator. Witnesses shall also receive reimbursement for incidental travel expenses, such as toll roads, bridges, tunnels, and ferries; taxicab fares between places of lodging and carrier terminals; and parking fees, upon presentation of a valid parking receipt. In the district of Alaska, whenever the use of a snowmobile, dog-team, or boat is approved by the court, a magistrate, the United States attorney, or an assistant United States attorney, witnesses shall be paid the actual rental cost or reasonable estimate of necessary expenses.

"(d) Witnesses, other than those who are incarcerated, who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall receive an additional allowance for subsistence expenses for each night they must spend away from their residences. Such witnesses who attend in areas which the Administrator of General Services has designated as high-cost areas under section 5702(c)(B), title 5, United States Code, shall receive an allowance equal to the maximum actual subsistence allowance which the Administrator prescribes for that area for official travel by employees of the Government. Such witnesses who attend in other areas shall receive an allow-

ance equal to the maximum per diem allowance which the Administrator of General Services prescribes pursuant to section 5702(a)(1) of title 5, United States Code, for official travel by employees of the Government.

"(e) When a witness is detained for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee which subsection (b) of this section provides.".

95TH CONGRESS
1ST SESSION

S. 2072

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 8, 1977

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Jury Selection and Service Act of 1968, as amended, to make the excuse of prospective jurors from Federal jury service on the grounds of distance from the place of holding court contingent upon a showing of hardship on an individual basis.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (7) of subsection (b), section 1863 of title 28, United States Code, is hereby repealed.

SEC. 2. Paragraphs (8) and (9) of subsection (b), section 1863 of title 28, United States Code, are hereby redesignated as paragraphs (7) and (8).

95TH CONGRESS
1ST SESSION

S. 2074

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 8, 1977

Mr. DECONCINI (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide in civil cases for juries of six persons, to amend the Jury Selection and Service Act of 1968, as amended, with respect to the selection and qualification of jurors, and to extend the coverage of the Federal Employees Compensation Act to all jurors in United States district courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SIZE OF CIVIL JURIES

SEC. 101. That chapter 121 of title 28, United States Code, is amended by adding a new section 1875 as follows:

"§ 1875. Number of jurors in civil cases

"(a) In a district court of the United States as defined in section 1869 (f) of this title, the petit jury shall, in a civil

case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, consist of six jurors unless the parties stipulate to a lesser number.

"(b) In such cases the verdict of the jury shall be unanimous, unless the parties stipulate otherwise.".

SEC. 102. Section 1870 of title 28, United States Code, is amended by striking the first sentence and inserting in lieu thereof the following:

"In a district court of the United States as defined in section 1869(f) of this title, in a civil case at law, or in a noncriminal action in which a right to trial by jury is otherwise granted by statute, each party shall be entitled to two peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges if their interests are similar, or in any such case the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.".

SEC. 103. Section 1869(f) of title 28, United States Code is amended by deleting the words "and 1867", and inserting in lieu thereof, "1867, 1870, and 1875".

SEC. 104. The chapter analysis of chapter 121, title 28, United States Code, is amended by adding at the end thereof the following new item:

"1875. Number of jurors in civil cases."

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SEC. 105. The amendments made by sections 101 and 102 hereof shall become effective on the thirtieth day which begins following the date of enactment.

TITLE II—USE OF VOTER LISTS IN JURY SELECTION

SEC. 201. Section 1863(b)(2) of title 28, United States Code, is amended to read as follows:

"(2) specify that the names of prospective jurors shall be selected from the voter registration lists or lists of actual voters of the political subdivisions within the district or division. There is a presumption that jurors so selected represent a fair cross section of the community in the district or division wherein the court convenes. The plan may prescribe some other source or sources of names in addition to voter lists where the court finds that voter lists do not represent a fair cross section of the community.".

TITLE III—JURY SERVICE UPON RESTORATION OF CIVIL RIGHTS

SEC. 301. Paragraph 5 of subsection (b) of section 1865, title 28, United States Code, is amended by placing a period after the word "restored" and by deleting the phrase "by pardon or amnesty." following the word "restored".

SEC. 302. Subsection (h) of section 1869 of title 28,

United States Code, is amended by placing a period after the word "restored" and by deleting the words "by pardon or amnesty." following the word "restored".

TITLE IV—AUTOMATED JURY SELECTION

SEC. 401. Section 1869 of title 28, United States Code, is amended by the addition of the following definitions:

"(j) 'publicly draw' as referred to in sections 1864 and 1866 of this chapter shall mean a drawing conducted within the district, after reasonable public notice, which is open to the public at large and under the supervision of the clerk or jury commission: *Provided, however*, That when a drawing is made by means of electronic data processing, 'publicly draw' shall mean a drawing conducted at a data-processing center, located in or out of the district, after reasonable public notice given in the district for which juror names are being drawn, which is open to the public at large and under such supervision of the clerk or jury commission as the Judicial Conference of the United States shall by regulation require;

"(k) 'juror summons' shall mean a summons issued by a clerk of court, jury commission, or their duly designated deputies, containing either a preprinted or stamped seal of court, and containing the name of the issuing

clerk imprinted in preprinted, typed, or facsimile manner on the summons or the envelope transmitting the summons.".

TITLE V—COVERAGE OF JURORS UNDER FEDERAL EMPLOYEES COMPENSATION ACT

SEC. 501. Chapter 81 of title 5, United States Code, is amended by the addition of the following new section:

"**§ 8142a. Federal petit or grand jurors**

"(a) For the purpose of this section, 'Federal petit or grand juror' means a person selected pursuant to chapter 121 of title 28, United States Code, and summoned to serve as a petit or grand juror, who is in actual attendance in court such that he would be entitled to the fees provided for his attendance by section 1871 of title 28.

"(b) Subject to the provisions of this section, this subchapter applies to a Federal petit or grand juror, except that entitlement to disability compensation payments does not commence until the day after the date of termination of his service as a juror.

"(c) In administering this subchapter for a juror covered by this subsection—

"(1) a juror is deemed to receive pay at a rate equivalent to the monthly minimum pay of a GS–2 unless his actual pay as a Government employee while serving

on court leave is higher, in which case his monthly pay is determined in accordance with section 8114 of this chapter.

"(2) performance of duty includes an act of a juror while he is in attendance at court, pursuant to a summons, in deliberation or when sequestered by order of a judge: *Provided, however*, That performance of duty shall not include his travel to and from the courthouse except under sequestration order or as necessitated by order of court, such as for the taking of a view.".

SEC. 502. The chapter analysis of chapter 81 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"8142a. Federal petit and grand jurors.".

95TH CONGRESS
1ST SESSION

S. 2075

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 8, 1977

Mr. DECONCINI (for himself and Mr. WALLOP) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Jury Selection and Service Act of 1968, as amended, by revising the section on fees of jurors and by providing for a civil penalty and injunctive relief in the event of a discharge or threatened discharge of an employee by reason of such employee's Federal jury service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Jury Fee and Juror Employment Protection Act of 1977".

SEC. 2. Section 1871 of title 28, United States Code, is amended in its entirety to read as follows:

"§ 1871. Fees

"(a) GENERAL AUTHORITY.—Grand and petit jurors in district courts appearing pursuant to this chapter shall be

paid the fees and allowances provided by this section. The requisite fees and allowances shall be disbursed on the certificate of the clerk of court in accordance with the procedure established by the Director of the Administrative Office of the United States Courts. Attendance fees for extended service under subsection (b) shall be certified by the clerk only upon the order of a district judge.

"(b) ATTENDANCE FEE; CERTIFICATION OF ADDITIONAL FEES FOR EXTENDED SERVICE.—A juror shall be paid an attendance fee of $30 per day for actual attendance at the place of trial or hearing. A juror shall also be paid the attendance fee for the time necessarily occupied in going to and returning from such place at the beginning and end of such service or at any time during the same.

"A petit juror required to attend more than thirty days in hearing one case may be paid in the discretion of the trial judge an additional fee, not exceeding $5 more than the attendance fee, for each day in excess of thirty days on which he is required to hear such case.

"A grand juror required to attend for more than forty-five days of actual service may be paid in the discretion of the district judge in charge of the particular grand jury an additional fee, not exceeding $5 more than the attendance fee, for each day in excess of forty-five days of actual service.

"Certification of additional attendance fees may be ordered by the judge to be made effective from and after the first day of extended service, without reference to the date of the certificate.

"(e) TRAVEL ALLOWANCES; TOLL CHARGES; PARKING FEES; TRAVEL IN AREAS OTHER THAN THE CONTIGUOUS STATES OF THE UNITED STATES.—A travel allowance equal to the maximum rate per mile that the Director of the Administrative Office of the United States Courts has prescribed pursuant to section 604(a)(7) of this title for payment to supporting court personnel in travel status using privately owned automobiles shall be paid to each juror, regardless of the mode of transportation actually employed. The prescribed rate shall be paid for the distance necessarily traveled to and from a juror's residence by the shortest practical route in going to and returning from the place of service. Actual mileage in full at the prescribed rate is payable at the beginning and at the end of a juror's term of service.

"The Director shall promulgate rules regulating interim travel allowances to jurors. Distances traveled to and from court should coincide with the shortest practical route.

"Toll charges for toll roads, bridges, tunnels, and ferries shall be paid in full to the juror incurring these charges. In the discretion of the court, reasonable parking fees may be

paid to the juror incurring such charges upon presentation of a valid parking receipt. Parking charges shall not be included in any tabulation of mileage cost allowances.

"Any juror who travels to district court pursuant to summons in an area outside of the contiguous forty-eight States of the United States shall be paid the travel expenses provided under this section, or actual reasonable transportation expenses subject to the discretion of the district judge or clerk of court as circumstances indicate, exercising due regard for the mode of transportation, the availability of alternative modes, and the shortest practical route from residence to court.

"(d) SUBSISTENCE ALLOWANCES; SUBSISTENCE IN AREAS OUTSIDE OF THE CONTIGUOUS UNITED STATES.—A subsistence allowance covering meals and lodging shall be established from time to time by the Director of the Administrative Office of the United States Courts pursuant to section 604(a)(7) of this title, except that such allowance shall not exceed the allowance for supporting personnel in travel status in the same geographical area, and such claims shall not require itemization.

"Such subsistence allowance shall be paid to a juror when an overnight stay is required at the place of holding court, and for the time necessarily spent in traveling to and from the place of attendance if an overnight stay is required.

"A subsistence allowance for jurors serving in district courts outside of the contiguous forty-eight States of the United States shall be allowed at a rate equal to that per diem allowance which is paid to supporting court personnel in travel status in those areas where the Director of the Administrative Office of the United States Courts has prescribed an increased per diem fee pursuant to section 6044(a)(7) of this title.

"(e) SEQUESTERED JURORS.—Whenever in any situation a jury is ordered to be kept together and not to separate, the actual cost of subsistence during such period shall be paid upon the order of the court in lieu of the subsistence allowances payable under subsection (d). Such allowance for the jurors ordered to be kept separate or sequestered shall include the cost of meals, lodging, and other expenditures ordered in the discretion of the court for their convenience and comfort.

"(f) PUBLIC TRANSPORTATION; TRANSPORTATION AFTER HOURS.—A juror who uses public transportation in traveling to and from the court, the reasonable cost of which is not met by the transportation expenses allowable under subsection (c) of this section on account of the short distance traveled in miles, may be paid in the discretion of the court the actual reasonable expense of such public transportation, pursuant to the methods of payment provided by this

section. Jurors who are required to remain at the court beyond the normal business closing hour for deliberation or for any other reason may be transported to their homes, or to temporary lodgings where such lodgings are ordered by the court, in a manner directed by the clerk and paid from funds authorized under this section.

SEC. 3. (a) Chapter 121 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1875. Employment rights

"(a) In the case of any individual who is absent from a position (other than a temporary position) in the employ of any employer to perform jury service, and who receives a certificate from the court verifying such service, and makes application, promptly after he is relieved from such service, to return to such position—

"(1) if such position was in the employ of a private employer, such individual shall—

"(A) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

"(B) if not qualified to perform the duties of such position by reason of disability sustained during the period of such service but qualified to

perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; or

"(2) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such individual should—

"(A) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

"(B) if not qualified to perform the duties of such position by reason of disability sustained during the period of such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

"(b) (1) Any individual who is restored to a position in accordance with the provisions of paragraph (1) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during his period of jury service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such individual entered upon jury service.

"(2) It is declared to be the sense of the Congress that any individual who is restored to a position in accordance with the provisions of paragraph (2) of subsection (a) of this section should be so restored in such manner as to give such individual such status in his employment continuously from the time of his entering upon jury service until the time of his restoration to such employment.

"(c) In any case in which two or more individuals who are entitled to be restored to a position under the provisions of this section, or any other law relating to similar reemployment benefits, left the same position in order to enter upon jury service, the individual who left such position first shall have the prior right to be restored thereto, without prejudice to the reemployment rights of any other individual to be restored.

"(d) (1) An individual claiming entitlement to the benefits of section 1875 of this title may make application to the district court for the district in which the employer alleged to have violated such section maintains a place of business and the court shall, upon finding probable merit in such claim, appoint counsel to represent such individual in any action in the district court necessary to the resolution of such claim. Such counsel shall be compensated and necessary expenses repaid to the extent provided by the Criminal Justice Act of 1964 (78 Stat. 552; 18 U.S.C. 3006A). The court may tax a defendant employer, as costs, payable to the court, the attorney fees and expenses of a prevailing employee, where such costs were expended by the court pursuant to this subsection.

"(2) In any action or proceeding under this section the court shall award a prevailing juror who brings such action by retained counsel a reasonable attorney's fee as part of the costs.

"(3) No fees or court costs may be taxed against any individual in good faith bringing any action under this section.

"(e) Any private employer who fails to reinstate, discharges, threatens to discharge, intimidates, or coerces any employee by reason of such employee's jury service attendance, or scheduled attendance in connection with such service, in any court of the United States shall be subject to a civil

penalty of not more than $10,000 for each violation as to each juror.

"(f) For purposes of this section, the term 'jury service' includes attendance in any court of the United States in connection with service upon any grand or petit jury of the United States.".

(b) The analysis of such chapter 121 is amended by adding at the end thereof the following new item:

"1875. Employment rights.".

SEC. 4. Section 1869 of title 28, United States Code, is amended by adding the following new subsection (1):

"(1) 'undue hardship or extreme inconvenience' as a basis for excuse from immediate jury service under section 1866(c)(1) of this chapter shall include undue hardship or extreme inconvenience to the prospective juror, such as grave illness in the family or any other emergency which outweighs in immediacy and urgency his obligation to serve as a juror when summoned. Additionally, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty continuous days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee at the time when he is summoned for jury service.".

SEC. 5. (a) Chapter 85 of such title is amended by adding at the end thereof the following new section:

"**§ 1364. Employment rights of jurors**

"The district courts shall have original jurisdiction, without regard to the amount in controversy, to require any private employer to comply with the provisions of section 1875 of this title, and to award damages for any loss of wages or other benefits suffered by reason of such employer's failure so to comply.".

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"1364. Employment rights of jurors.".

SEC. 6. The amendments made by section 2 of this Act shall apply in the case of any grand or petit juror serving on or after the sixtieth day following the date of enactment of this Act, and the amendments made by sections 3, 4, and 5 of this Act shall apply to any grand or petit juror summoned for service or actually serving on or after the date of enactment of this Act.

STATEMENT OF CARL H. IMLAY, GENERAL COUNSEL, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ACCOMPANIED BY WILLIAM R. BURCHILL, JR., ASSOCIATE GENERAL COUNSEL

Senator DeConcini. Our first witness today is Mr. Carl Imlay.

Mr. Imlay. Thank you, Mr. Chairman.

In addition to my role here as General Counsel to the Administrative Office, Mr. Burchill, my associate and I serve as the Secretariat for the Judicial Conference Committee on the Operation of the Jury System, which is the committee of the conference that watches and oversees the administration of the jury system in the Federal courts.

In the interest of time, Mr. Chairman, I should like to summarize my statement, if I may, and introduce the full statement as part of the record.

Senator DeConcini. Without objection, so ordered. The statement will be inserted at this point in the record.

[The prepared statement of Mr. Carl Imlay follows:]

Statement of Carl H. Imlay

Mr. Chairman and members of the Subcommittee, my name is Carl H. Imlay, and I am General Counsel to the Administrative Office of the United States Courts. I am here today at the request of the Subcommittee to present the views of the Judicial Conference of the United States on three legislative proposals relating to the administration of the jury system in the United States district courts, as well as on bills which would adjust the compensation of witnesses in those courts and the fees payable to United States marshals. With your permission I should like to address myself specifically to each of the bills under consideration, and I shall then be pleased to try to respond to any questions which the Subcommittee may have.

S. 2075—JUROR COMPENSATION AND EMPLOYMENT PROTECTION

I should first like to discuss the pending bill, S. 2075, which embodies proposals recommended by the Judicial Conference to increase the compensation of persons serving as jurors in the federal courts and to provide statutory protection to such persons against adverse consequences to their employment flowing from their being summoned for jury service. I shall focus initially upon that portion of the bill respecting juror compensation.

Increased Fees and Expenses Reimbursable

S. 2075 would amend section 1871 of title 28, United States Code, to provide an increase in the attendance fees payable to federal jurors and in the rate at which they may be reimbursed for their travel and subsistence expenses incurred in the performance of jury duty. Before describing these amendments in detail, I should provide some background information about the development and history of this proposal by the Judicial Conference.

The fees payable and expenses reimbursable to jurors in the federal district courts were last adjusted in 1968, when the Jury Selection and Service Act[1] of that year amended 28 U.S.C. § 1871 to set the compensation rates at their present levels. It has now been nine and one-half years since any alteration was made in these levels of monetary compensation. Clearly the rate of inflation in our economy during this period has greatly reduced the real value of these amounts of compensation in terms of their present worth and purchasing power in the marketplace. For example, the Consumer Price Index, as computed by the Department of Labor, has increased about 75 percent from an August, 1968 figure of 105.7 to 185.5 in August, 1977. This means that the $20 daily attendance fee for jurors which was established in 1968 is now worth only about $11.40 in terms of 1968 purchasing power. Likewise the rapidly escalating cost of energy, which has increased even faster than the overall price index, has rendered wholly in-

[1] Public Law No. 90-274, § 102(a), 82 Stat. 53, 62.

adequate the travel reimbursement rate to jurors of 10 cents per mile now provided by section 1871. By comparison, the authorized rate of reimbursement to government employees for official travel by automobile has just been raised to 17 cents per mile after having been set at 15.5 cents per mile since October, 1976. This figure is based on the actual cost of automobile transportation.

The Judicial Conference reacted to these economic trends by recommending at its March, 1974 session that the Congress adopt legislation with respect to juror compensation which was virtually identical to that now again being urged as contained in section 2 of S. 2075. Such draft legislation was immediately transmitted to the Congress, and in the intervening years it has twice been passed by the United States Senate after having been favorably reported by its Judiciary Committee in essentially the form recommended by the Judicial Conference. First, the Senate passed S. 3265 in the 93rd Congress on October 2, 1974, but the House of Representatives took no action upon this bill. In the 94th Congress the Senate approved a similar bill, S. 539, but once again this measure failed of passage in the House of Representatives. In passing S. 539 on September 30, 1975, the Senate was acting upon the report (No. 94–400) of your Committee, which summarized the need for this legislation in pertinent part as follows:

"In the seven years which have passed since the adoption of that fee structure, inflation has rendered it inadequate. The costs of subsistence and travel, as well as the salary loss involved in jury service for those whose salary is suspended during that service, have increased dramatically.

"Not only has inflation made the daily fee inadequate, but in addition the daily subsistence expense of $16.00 per day is inadequate in those circumstances where a juror lives a long distance from the place of holding court and is paid a subsistence allowance in lieu of mileage. In many cities that amount will obviously not adequately compensate the juror for the cost of a hotel room and meals. . . .

"Travel allowances mandated by the existing fee structure have also been outdated by the events of the past seven years, especially by the increased price of gasoline in the past eighteen months. Under existing law a juror receives only 10 cents per mile, regardless of the means of transportation used. . . . In view of the Government Services Administration [sic] studies, most jurors are today receiving between 4.4 and 10 cents per mile less than their actual travel costs." [Footnotes omitted.]

The financial circumstances attaching to federal jury service as described by the above excerpts from Senate Report No. 94–400 have grown yet more severe in the two years since those words were written. Accordingly, the need for immediate legislative action to augment the compensation payable by the government to persons on jury duty in federal courts is now more urgent than ever. The bill, S. 2075, which is pending before your Subcommittee, would meet this need by amending 28 U.S.C. § 1871 in the following respects:

First, this bill would provide in section 1871 for a 50 percent increase in the regular daily attendance fee paid to federal jurors, raising this amount from $20 to $30 per day. In view of the greatly altered economic circumstances of the nation and the diminished value of the dollar since this fee was last adjusted in 1968, it is the position of the Judicial Conference that an increase of this dimension is the minimum which is required to carry out the purposes of the attendance fee as a device to afford minimal financial compensation in recognition of the services rendered by jurors and to obviate undue financial hardship to them. While S. 539 as passed by the Senate in the 94th Congress would have increased the attendance fee to only $25 per day instead of the $30 recommended by the Judicial Conference, it is our view that the continuing inflationary spiral and decrease in the value of the dollar, which has persisted with the passage of time, has strengthened the case for increasing the daily jury fee in the full amount originally recommended by the Judicial Conference in 1974.

This $30 amount is not large in comparison to the average per-day income now being received by private non-farm payroll workers. When Rowland F. Kirks, Director of the Administrative Office of the United States Courts, testified before your Subcommittee in 1974 regarding jury compensation, he pointed out that the average daily income for such workers in May, 1974 was $33.12. The Bureau of Labor Statistics now advises us that the average daily wage for private payroll workers in August of this year was $38.07. It is stated in Senate Report No. 94–400 that juror fees have traditionally been considered as a gratuity and are not necessarily to be treated as a wage substitute.[2] Nevertheless the daily at-

[2] It should nevertheless be noted that jury fees are considered under the Regulations of the Secretary of the Treasury as taxable income to the recipient unless excluded by law. See section 1.61–2(a)(1) of the Federal Tax Regulations, 26 C.F.R. § 1.61–2.

tendance fee should logically bear some rational relationship to the prevailing standard of wages if it is to have any value as a financial recognition by the government of the public service involved in performing jury service and as a device to alleviate financial hardship to those many jurors whose salary is not continued during their absence from employment.

S. 2075 would preserve the provision of the present section 1871 permitting jurors to be paid an enhanced attendance fee of an additional $5 per day in circumstances where they must render jury service of long duration. It is now provided that any juror required to attend court for more than 30 days in hearing one case may be paid at the discretion of the trial judge a daily attendance fee of $25 for each day in excess of 30 days that he is required to hear such case. This discretionary augmented attendance fee is applicable to petit jurors, and the Comprtoller General of the United States in his decision at 54 Comp. Gen. 472 (1974) clarified with respect to the Watergate grand jury that this enhanced fee provision also applies to grand jurors when they are occupied in excess of 30 days in hearing one matter.

S. 2075 would retain discretion in the trial judge to order the payment of an additional fee not exceeding $5 per day for each additional day beyond 30 days on which jurors must actually attend court for service on a petit jury in a single case. With respect to grand juries, the bill places similar discretion in the district judge in charge of the grand jury to order payment of this augmented fee for each day beyond 45 days on which the grand jurors actually serve. Because it is difficult to apply the "one case" requirement to grand juries, which normally investigate numerous transactions involving multiple indictments during their term of service, the payment of an enhanced attendance fee to grand jurors would not be linked to a requirement of service in a single case. Rather they would become entitled to the augmented fee at the discretion of the judge upon their completion of 45 days of actual service in lieu of the 30 days' service in a single case which is required of petit jurors in order for enhanced fee eligibility. The bill would also clarify that certification of additional daily attendance fees under this section may be made effective retroactively by a judge from the first day of extended jury service without regard to the actual date of certification. The Comptroller General approved such retroactive certification under present law in his above-referenced decision.

As noted above, it is presently provided by 28 U.S.C. § 1871 that federal jurors shall be reimbursed for travel expenses between their residences and the place of holding court at the rate of 10 cents per mile plus the amount expended for tolls. This rate of reimbursement applies without regard to the method of transportation actually employed by the juror. The rate of 10 cents per mile was established for jurors in 1957,[3] and it has not been changed since that time. This rate of reimbursement has become grossly inadequate in recent years on account of the rapid increase in the price of gasoline for private automobiles and the concomitant increase in the cost of transportation by public conveyance or common carrier. The Congress two years ago recognized the need to reimburse government employees more generously for official travel in the light of these increased costs by passing the Travel Expense Amendments Act of 1975, which amended 5 U.S.C. § 5704 to grant regulatory authority for the reimbursement of employees in an amount not in excess of 20 cents per mile for use of a privately-owned automobile.

In addressing the problem of increased travel expense allowances for jurors, the Judicial Conference has recognized the need, not only for an immediate increase in the absolute rate of reimbursement payable, but also for increased flexibility to provide additional such increases in the future without the need to continually amend section 1871 for this purpose. In view of uncertainties as to future availability of fossil fuels and the likelihood of additional dramatic price increases in gasoline and petroleum in the years to come, the reimbursable rate of travel expenses for jurors may require frequent adjustment in order to keep pace with growing travel costs. It is therefore recommended, and S. 2075 would provide, that section 1871 be amended to authorize the payment of a travel allowance to federal jurors equal to the maximum rate per mile that the Director, Administrative Office of the United States Courts, has prescribed for payment to supporting court personnel in travel status using privately-owned automobiles. The Director is empowered to prescribe this travel allowance for court employees by 28 U.S.C. § 604(a)(7), which provides that he shall regulate and pay necessary travel expenses incurred by judges and court personnel, and by

[3] Act of Sept. 7, 1957, Public Law No. 85-299, 71 Stat. 618.

5 U.S.C. § 5707(a), which states that he shall prescribe regulations with respect to official travel by employees of the judicial branch of the government. His power under this latter statute corresponds to that of the Administrator of General Services with respect to government employees outside the judiciary.

As an illustration of the need for regulatory flexibility in prescribing travel allowances, the rate of reimbursement for official travel by private automobile has already been adjusted administratively on three occasions since the passage of the Travel Expense Amendments Act in May, 1975. As previously noted, the most recent adjustment established this rate at 17 cents per mile. If S. 2075 were to become law, this is the rate which would immediately become payable to jurors in compensation for their travel expenses between home and courthouse. Unless and until section 5704(a) of title 5 may be amended to increase the ceiling of 20 cents per mile upon reimbursement for official use of a privately-owned automobile, the Director of the Administrative Office would be precluded from setting the reimbursable rate for juror travel above this amount because the maximum rate which he could prescribe for supporting court personnel in travel status would be 20 cents. Clearly an urgent need exists for an immediate increase in the travel expenses payable to jurors, and there is an equivalent need for a stream-lined mechanism by which future needed increases in the travel reimbursement rate may be made by administrative action without further legislation. S. 2075 would meet both of these needs. It would further establish the fair and desirable principle of equating the reimbursement to jurors for their transportation with that payable to court personnel generally for official travel.

Section 1871 as amended by S. 2075 would continue the present practice of linking the juror travel allowance to the mileage traveled without regard to the mode of transportation actually employed. With respect to jurors this method is sensible, since the distance they must travel is frequently such as to lend itself most readily to automobile transportation. This results from the fact that jurors are summoned from throughout a judicial district or a division thereof,[4] and they therefore must frequently travel to court from a greater distance than would be served by typical metropolitan bus routes or other forms of public transportation. On the other hand, the distance traveled will seldom be so great as to entail the use of trains or airplanes, except perhaps in those judicial districts which are extremely large geographically.

Section 1871 as amended would further give the Director of the Administrative Office express statutory authority to adopt regulations governing interim travel allowances to jurors where daily travel between courthouse and residence is impractical and an overnight stay is necessitated. The present statute lacks such a regulatory provision and limits the payments for interim travel so as not to exceed the $16 subsistence allowance presently authorized when an overnight stay is required. The proposed amendment would give the Director needed authority to define the circumstances where interim travel expenses shall be paid and to adopt limitations upon such payments which will reasonably accommodate the convenience of jurors facing lengthy commutes and long trials, while protecting against abuse through unnecessary expenditures for wasteful interim travel.

S. 2075 would retain in section 1871 the authority to pay in full the toll charges incurred by jurors in traveling to court. It would further add an important provision allowing reasonable parking fees to be paid to jurors at the discretion of the local district court in which they serve. There is presently no authority to reimburse jurors for parking expenses, and this is the source of frequent complaints to the clerks of court and to my office from jurors. This bill would allow the payment of parking fees in addition to mileage and toll charges. Discretion with respect to parking fees is placed in each district court in order that standing local policies may be established as to whether sufficient public transportation exists so that payment for parking would be unjustified, and if not, as to what would be a reasonable limitation upon allowable parking expenses in each geographical area.

This bill would add to section 1871 through the final paragraph in proposed subsection (c) a new provision to recognize the higher costs of travel in the territories and in Alaska and Hawaii. No provision is presently made in section

[4] The maintenance of separate jury selection plans for each statutory or other division of a judicial district is authorized in 28 U.S.C. § 1863(a). The district courts are given broad authority by 28 U.S.C. § 1869(e) to administratively establish divisions for jury selection purposes without regard to statutory divisions or where there are no statutory divisions.

1871 for any additional travel allowance for jurors serving in these areas. With respect to Alaska, the Director has been able to pay jurors serving that court enhanced fees and allowances by virtue of the Alaska Omnibus Act.[5] No similar enhancement is authorized by present law in the payments to jurors in Hawaii or in the territorial courts. This bill would therefore provide in proposed subsection 1871(c) that in a district court outside of the contiguous 48 states jurors may be paid in lieu of the travel expenses provided by this subsection their actual reasonable transportation expenses in the discretion of the district judge or clerk of court.

With respect to subsistence allowances, it is presently provided that jurors shall be paid a flat subsistence rate of $16 per day if daily travel appears impracticable or if an overnight stay is necessitated in going to or returning from the place of attendance. The $16 amount was established in 1968 and is clearly inadequate to cover necessary expenses presently incurred during an overnight stay in a major metropolitan area. For instance, the Consumer Price Index category for restaurant meals, as computed by the Labor Department, has almost doubled in nine years from 105.1 in 1968 to a present level of 200.0. An increase of similar dimensions has occurred in the price of city hotel rooms. S. 2075 would respond to this problem by authorizing the Director of the Administrative Office to establish for jurors a subsistence allowance covering meals and lodging which shall not exceed the allowance applying to supporting court personnel in travel status in the same geographical area. (This is deemed to authorize the payment to jurors serving in designated high-rate geographical areas of an allowance not exceeding the amount fixed under 5 U.S.C. § 5702(c) as a limitation upon reimbursement for actual expenses[6] to court personnel traveling to these areas.)

The Director has presently prescribed a per diem allowance for court personnel of $35, as authorized at 5 U.S.C. § 5702(a), and has authorized personnel on travel assignments in certain specified high-cost areas to claim actual expenses up to specified amounts not exceeding $50, as authorized by section 5702(c). These are the rates which would be made applicable, upon the passage of S. 2075, to federal jurors when an overnight stay is required at the place of holding court or during the time necessarily spent in traveling to or from such place. Thus the bill would make possible the implementation of a needed increase in the subsistence allowance for jurors at this time, and would in the interest of fairness equate the allowance to jurors with that payable to court personnel on travel status in the same locality. It would further establish a mechanism for the orderly adjustment of this amount by administrative action in the future as further increases in the per diem allowance for government employees may be authorized legislatively through amendments to chapter 57 of title 5 governing travel.

I should also point out that proposed subsection 1871(e) maintains the present policy of paying from appropriated funds the actual costs of subsistence of juries ordered to be sequestered during their service. The individual jurors, of course, receive no separate subsistence allowances for these periods, but the cost of meals, lodging, and transportation for the whole jury is paid directly by the government. Additional language has been added in this proposed subsection to provide that other expenditures aside from meals and lodging may be ordered by the court for the "comfort and convenience" of sequestered jurors. The experience of sequestration for an extended trial of several months (such as the Watergate cases, or the recent trial of Governor Mandel in Maryland) can impose great psychological and emotional stress upon the jurors. Therefore, expenditures of funds for occasional outings, church attendance, or other diversions, in the discretion of the trial judge and while the court is not in session, have been authorized by the Administrative Office in the past. This bill would extend statutory recognition to this practice with the understanding that it would apply only in extraordinary circumstances. Think of the situation of a sequestered juror confined to a motel room for three months when not in court, removed from his family and friends. The bill would assist in this difficult situation.

The remaining subsections of section 1871 as it would be amended would permit payment of the actual cost of public transportation to jurors in metropolitan areas where the fare would exceed the regular transportation reimbursement to them on account of a short mileage distance from their home to the courthouse and which is not in proportion to the fare charged. They would

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[5] Public Law No. 86–70, § 23(c), 73 Stat. 141.

[6] By the terms of the bill, jurors would receive a flat subsistence allowance and would not be required to itemize their claims in any locality.

further empower the clerks of court to arrange at government expense special transportation home for jurors required to remain at the courthouse late into the evening. This provision is obviously intended to ensure secure transportation for jurors who must deliberate late in metropolitan areas where the neighborhood surrounding the courthouse might be dangerous after dark. Finally, the proposed subsection (g) would authorize the Director of the Administrative Office to promulgate regulations as necessary to carry out his authority under this section.

I should point out that the presence in the courtroom of randomly selected jurors chosen from a fair cross section of the community is central to our republican form of government. It has clearly been mandated by the Congress through the Jury Selection and Service Act of 1968 at 28 U.S.C. § 1861. We can only maintain this element of representativeness so long as the fees and expenses which we pay are adequate to offset the individual juror's cost of attending the court. As soon as these payments become inadequate, the economically disadvantaged prospective jurors, including minority representatives, are unable to afford to perform this civic duty and must seek a hardship excuse. When we demand that jurors attend court essentially at their own expense, we lose the day workers, the commission salesmen, the mothers who must pay for baby sitters, the small farmers, and the many other ordinary citizens who should serve and would otherwise gladly serve. It is important to remember that jurors may be called for long trials or for a series of several trials, and that when they are called for grand jury service they may be used for 18 months, the maximum term of a regular grand jury as provided by Rule 6(g) of the Federal Rules of Criminal Procedure. Thus the compensation provisions of this bill are relevant and vital to the effort to preserve the representative character of the jury, completely aside from their effect upon the convenience and economic comfort of the individual jurors.

Employment Protection

Section 3 of the bill, S. 2075, contains essentially the proposal of the Judicial Conference to provide statutory protection to the rights of federal jurors to continued employment without adverse consequences resulting from their summons for jury duty. In recent years it has come increasingly to the attention of the district courts and of my office that jurors are sometimes coerced, threatened, or intimidated by their employers for the purpose of discouraging their performance of jury service or motivating them to seek an excuse from such service. On other occasions jurors who have served their term of duty, sometimes despite the threats posed by their employers, are inexplicably dismissed from their employment for no announced or apparent reason and clearly as a result of their absence for jury service. It is the position of the Judicial Conference that federal jurors should not be subjected to this sort of harassment or retaliatory discharge by employers. It is provided at 28 U.S.C. § 1861 that all citizens summoned for jury duty in the United States district courts "shall have an obligation to serve as jurors when summoned for that purpose." As a consequence of imposing this obligation, it is submitted that the government has a corresponding duty to afford reasonable protection to federal jurors against adverse consequences in their daily lives as a result of their performance of the obligation imposed upon them.

In the absence of statutory protection to jurors' employment at present, instances of apparent employer misconduct in this regard have been handled in two different ways. First, several incidents involving the firing of a juror from his job have been referred to the Civil Rights Division of the Department of Justice for an investigation by the Federal Bureau of Investigation. While the Civil Rights Division has agreed to have investigated those incidents brought to their attention and to explore any available legal remedies to vindicate the civil rights of the aggrieved jurors, they have yet to find an incident of this sort which would come within the scope of any remedies which could be pursued by the Justice Department under existing law.

Secondly, some district judges have responded to apparent instances of employer interference with the jury service of their employees by finding such employers or their agents in contempt of court and imposing penalties. As an example of this sort of judicial response, I would cite the memorandum opinion and order[7] of United States District Judge Charles W. Joiner of the Eastern

[7] *In re Dennis Adams and American Motors Corp.*, 421 F. Supp. 1027 (E.D. Mich. 1976).

District of Michigan, in which he found the American Motors Corporation and one of its officials in contempt and fined them for pressing an employee to seek excuse from jury service and implying that he would be dismissed from his job if an excuse were not obtained.

The above-described methods of responding to employer threats or unjustified discharges of jurors from employment are defective in that they cannot respond to the many threats or instances of coercion which never come formally to the attention of the court. Rather such instances frequently manifest themselves only through the action of the employee who has been summoned for jury service in seeking against his will to be excused by the court under 28 U.S.C. § 1866(c)(1). Such a request, of course, will normally be made for some announced reason which does not reveal to the court the role of the employer in motivating the excuse request by a prospective juror who actually desires to serve in that capacity but is afraid to do so. This sort of situation not only presents an interference with the right of an employee to have the opportunity for jury service as provided in 28 U.S.C. § 1861, but it also threatens the ability of the courts to obtain juries "selected at random from a fair cross section of the community," as further required by that section.

The Judicial Conference therefore believes that legislative action is necessary to place in the United States Code a law expressly subjecting this sort of employer conduct against a federal juror to the imposition of a civil penalty, injunctive relief, and to liability for damages. The bill, S. 2075, would provide such a law by adding proposed new section 1875 to title 28 of the United States Code. I should note at this point that the phrasing of this section as contained in S. 2075 has been slightly altered at the suggestion of the Department of Justice from the original wording recommended by the Judicial Conference. The present wording is identical in most respects to that passed by the Senate two years ago in S. 539, but several new ideas have also been embodied in it. While the Judicial Conference has never formally passed upon this version of proposed section 1875 as contained in S. 2075, it has been presented to the Conference's Committee on the Operation of the Jury System and there met with no objection. We further believe it to be clear that the sort of employment protection which would be provided by S. 2075 is fully consistent with the aims of the Judicial Conference in making this recommendation initially. We therefore endorse section 3 of S. 2075 without reservation and strongly urge its immediate passage.

As noted, this section would enact proposed 28 U.S.C. § 1875, which would require that an individual who has been absent from his employment to perform federal jury service and who attempts thereafter to return to his job shall, if still qualified, be restored to the same position or to a position "of like seniority, status, and pay," unless the employer has experienced a demonstrable change of circumstances making it impossible or unreasonable to require him to rehire the returning juror. It would further be declared as the sense of the Congress that an individual in the employ of any state or political subdivision thereof should be entitled to similar reemployment rights upon the termination of federal jury service.

Proposed section 1875(d) would authorize the district courts, upon a finding of probable merit, to appoint counsel to represent a juror or former juror in any necessary legal action against an employer to vindicate the rights just described. Such counsel would be compensated from appropriated funds in the same amounts provided by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, for payment to court-appointed counsel in criminal cases where the defendant cannot afford an adequate defense. Express authority would be granted to the courts to award a prevailing juror in such an action a reasonable attorney's fee and to tax against an employer the attorney's fees and expenses expended from appropriated funds on behalf of a prevailing employee, but no such taxation could be made against a juror who brought suit against an employer under this section unsuccessfully but in good faith.

The remedies available in the district courts to jurors who claim to have been aggrieved by their employers under this section are enunciated in section 3 of the bill, which would add new section 1364 to title 28. This would be a jurisdictional section granting original jurisdiction to the district courts, without regard to amount in controversy, to require any private employer to comply with section 1875 and to award damages "for any loss of wages or other benefits suffered by reason of such employer's failure so to comply." Section 1875(e) would further subject any private employer "who fails to reinstate, discharges, threatens to dis-

charge, intimidates, or coerces any employee" by reason of such employee's jury service to a civil penalty of up to $10,000 for each violation as to each juror. Action to enforce this civil penalty would be initiated by the United States Attorney upon the complaint of an aggrieved juror. I emphasize, however, that under this section no United States Attorney's office would ever represent a juror directly in a private action against an employer. The Department of Justice believes, and we concur, that such representation of a juror by the United States Attorney would be inappropriate in view of the juror's possible participation in trials involving the United States.

Finally, section 4 of S. 2075 would add to the definitional section of the Jury Selection and Service Act, 28 U.S.C. § 1869, a statutory definition of the term, "undue hardship or extreme inconvenience," which is used in the Act as a basis for the excuse of prospective jurors from such service. In the absence of a statutory definition of this term, it has been left to judicial discretion to resolve its meaning on an individual basis. The enactment of a definition of this criterion for excuse from jury service will be useful in bringing some uniformity to the interpretation of this term by judges in ruling upon requests for temporary excuse from such service under 28 U.S.C. § 1866(c)(1).[8] The proposed definition would further extend to the courts the authority to excuse prospective jurors temporarily on the basis of severe economic hardship which would result to their employers from the loss of a key employee on account of jury service which is expected to last more than 30 days. In view of the responsibilities which would be imposed on employers by this bill to preserve the employment status of employees called for jury duty in federal courts, it is thought fair to provide that the courts in ruling upon excuse requests shall consider the short-term economic consequences to employers from the loss of vital employes at a particularly busy season. The granting of an excuse from jury service on account of hardship to an employer under this definitional section would be only temporary in nature and could not be used by an employer as a basis to keep an employee indefinitely from being called. Additionally, it would apply only where extended jury service is envisioned. It is felt nevertheless that some protection to the interests of employers is appropriate, particularly in the case of small employers who might be unable to hire a satisfactory temporary replacement for a key employee and who would be precluded by this bill from attempting to permanently replace such an employee on account of jury service or to interfere with his performance of such service in any other manner.

The employment protection section of S. 2075 would give the district courts a means to balance the scales of power between jurors and their employers in situations where retaliation has been threatened or exercised as a result of an employee having been summoned for or having rendered federal jury service. Every citizen has a duty to serve as a juror when called upon to do so. A juror should not be made to suffer serious economic consequences for performing this civic duty. He or she should also be able to perform this function objectively without the oppressive fear that there may be no job to return to upon the completion of jury service.

I should add that the Judicial Conference at its recent session only last week reendorsed the proposals contained in S. 2075, as it has done on many previous occasions, and urged their prompt enactment into law. I can state that the Conference has no higher legislative priority than the granting to federal jurors of the relief which would be provided by this bill. Such measures are entirely appropriate, especially in view of the grave responsibilities imposed upon the citizens of this country when they are summoned to render jury service in the United States district courts.

S. 2074—OMNIBUS JURY BILL

S. 2074 combines five separate proposals respecting the administration of the jury system in the courts of the United States. Each of these proposals has been repeatedly endorsed by the Judicial Conference, and all of them have been transmitted to previous Congresses as separate legislative items without being acted upon. The Judicial Conference urged that these proposals should be

[8] The criterion of "undue hardship or extreme inconvenience" is also applicable to the granting of permanent excuses to prospective jurors under the district court selection plan. 28 U.S.C. § 1863(b)(5). Here the eligibility for excuse is determined by membership in a group or occupational class defined in the plan. Therefore the definition of this term is less meaningful here, since it has already been implicitly made by the courts through the specification of eligible groups and classes.

combined into a single draft bill in the hope that this would facilitate their consideration by the Congress as an overall package which would improve federal jury administration.

Six-Person Civil Juries

Title I of S. 2074 would add to title 28 of the United States Code a provision that the petit jury in a civil case shall consist of six persons unless the parties should stipulate to a lesser number pursuant to Rule 48, Federal Rules of Civil Procedure. The requirement that the verdict of the jury in civil cases must be unanimous would be preserved unless the parties stipulate to the contrary. This title would also amend section 1870 of title 28 to reduce the number of peremptory challenges available to each party in civil cases from three to two.

The Judicial Conference has long urged that the federal district courts should try civil cases to juries of less than the traditional 12 persons. In March, 1971, the Conference adopted a resolution approving in principle a reduction in the size of civil juries and in the number of peremptory challenges allowed. The means to effectuate these objectives was not immediately resolved. Subsequently the Conference endorsed and transmitted to the Congress draft legislation to accomplish these purposes uniformly in the federal courts on a nationwide basis. At the same time many of the individual district courts reacted to the Judicial Conference resolution by adopting local court rules for the trial of civil cases, where a jury trial is demanded, by juries of six persons. In succeeding years such local rules were adopted by a growing number of courts, and our records now indicate that such rules have been adopted by the courts in 82 out of the 94 federal judicial districts. Despite the widespread adoption on a local basis of this reform in the trial of civil cases, it remains the position of the Judicial Conference that the reduction in the size of civil juries should be legislated on a uniform basis in order to standardize this reform throughout the federal system and to establish six jurors as the uniform number for the trial of civil cases. At present several of the local court rules adopted by the various districts provide for civil juries of eight or perhaps some other number, although the vast majority provide for six-person civil juries as recommended by the Judicial Conference.

The desire of the Judicial Conference to achieve a reduction in civil jury size is based upon the conviction that such juries are fully as adequate as the traditional 12-person panels to justly adjudicate civil controversies between individuals. In civil cases the sensitive considerations which pertain to criminal jury trials[9] under the Sixth Amendment and the due process clauses of the Constitution do not apply. Thus the preservation of the traditional 12-person jury, which has been thought to maintain its vitality in criminal cases, would not serve any necessary purpose on the civil side. Recognizing these considerations, the Judicial Conference is therefore of the view that the federal courts should avail themselves of the savings in time and money which results from the impanelment and deliberation of a smaller jury panel.

The use of six-person juries in federal civil cases under a local rule of the United States district court has been expressly affirmed by the United States Supreme Court in the case of *Colgrove* v. *Battin*, 413 U.S. 149 (1973). The Court there held that the Seventh Amendment to the Constitution does not engraft onto the jury trial guarantee the right to be tried by any specific number of jurors. This was found to be true despite the language in the Seventh Amendment preserving the right to jury trial in suits at "common law." In so holding, the Supreme Court found that a jury of six persons fully satisfies Seventh Amendment requirements:

"What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals, but, on the basis of presently available data, that cannot be concluded as to the number six." 413 U.S. at 160, fn. 16 (citations omitted).

Justice Brennan's opinion for the Supreme Court in the *Colgrove* case also made reference to the existence of empirical evidence that there is no discernible difference in the results arrived at by six-person and twelve-person juries. The decision of the Supreme Court in this case affords strong legal support for the use of six-person juries in federal civil cases and for the enactment of title I of S. 2074 to so provide throughout the federal court system. The reduction in

[9] *Cf. Williams* v. *Florida*, 399 U.S. 78 (1970), respecting state criminal cases.

peremptory challenges which would be made by this bill is a logical concomitant of the reduction in the size of the jury, since the calling of a smaller jury panel would justify the allowance of fewer challenges.

Voter Lists as Selection Source

Title II of S. 2074 would amend section 1863(b)(2) of title 28 to establish a statutory presumption that jurors selected from voter registration lists or lists of actual voters are representative of a fair cross section of the community in the district or division where the court convenes, consistent with the requirement imposed upon the selection process by 28 U.S.C. § 1861. The amendment would also require the district courts to make the affirmative finding, as a prerequisite to the prescription of supplemental sources of juror names, that the voter lists in their districts do not represent such a fair cross section. The bill would replace the following language in the existing version of 28 U.S.C. § 1863(b)(2):

"The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title."

The above section establishes the voter registration lists or lists of actual voters of the political subdivisions within the judicial district as the primary source of names of prospective jurors for the district courts. In fact, such voter lists are the exclusive source used by all but two of the 94 federal judicial districts.[10] The view of the Congress as to the desirable characteristics of voter lists as the most appropriate source of juror names is clear from the legislative history of the Jury Selection and Service Act. For example, the reports of the Senate and House Judiciary Committees upon this Act stated that voter lists "provide the widest community cross section of any list readily available." These reports also manifest the Congressional view that the exclusive use of voter lists should be adequate to satisfy constitutional requirements and to comply with the cross sectional requirements of the statute.

Nevertheless the above-quoted language of existing section 1863(b)(2) has served as the stimulus for many court actions challenging the validity of the jury selection plans in the various districts. In such challenges the claim has commonly been made that this section of the Jury Act imposes a duty upon the courts to find and utilize supplemental sources of juror names in addition to voter lists. This view has been uniformly rejected in judicial decisions.[11] Nevertheless much judicial time has been consumed by these challenges to the jury system, and such challenges are likely to continue so long as the present language regarding supplementation of source lists remains in the law. Besides consuming court time, such challenges have caused a number of courts to think seriously about employing supplemental lists. These courts have generally come to the conclusion that supplemental lists which would be an improvement upon the voter lists in building a cross sectional base of juror names, and which are otherwise satisfactory for jury selection purposes, are difficult and perhaps impossible to find. As then Attorney General Ramsey Clark said in testifying on the legislation which became the Jury Selection and Service Act of 1968:

"We looked at every type of list we could find. We looked at post office addresses, at Civil Service Commission lists, at social security lists, and we considered telephone books, and a city directory sort of list, and we couldn't find any list that would be across the country nearly as good as the voter list. We put a quite high priority on certainty as to where the individuals should be chosen from, and we found some relationship between the public interest which would cause a person to register to vote, and jury service."[12]

The Judicial Conference is therefore of the view that the enactment of the proposed amendment in title II of this bill would assist the administration of justice by reducing the number of frivolous challenges to jury administration made by litigants, particularly criminal defendants seeking a basis to overturn their indictments or convictions, and would provide greater certainty to the district courts in the administration of their jury selection plans. This amend-

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[10] The district courts in Colorado and the District of Columbia provide in their jury selection plans for the use of motor vehicle drivers' license records in supplementation to the voter lists in those districts.

[11] E.g., *United States* v. *Whitley*, 491 F.2d 1248 (8th Cir. 1974), *cert. denied*, 416 U.S. 990, and *United States* v. *Test*, 394 F. Supp. 683 (D. Colo. 1975), *affirmed*, 550 F.2d 577 (10th Cir. 1976).

[12] Hearings on Federal Jury Selection Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 43 (1967).

ment would continue to permit district courts to provide in their plans for other sources of juror names in addition to voter lists. A statutory presumption in favor of the adequacy of the voter lists as such a source would be established, however, and the courts would have to make an express finding in derogation of this presumption before prescribing any supplemental source.

Restoration of civil rights as qualification

The qualifications for jury service in the federal courts are set forth at 28 U.S.C. § 1865(b), which provides that any person shall be deemed qualified unless, *inter alia*, he "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment of more than one year and his civil rights have not been restored by pardon or amnesty." Title III of S. 2074 would amend this subsection by eliminating the last four words, thus removing the enumeration of pardon and amnesty as methods of restoring civil rights. The Judicial Conference has recommended this amendment because these words have often been interpreted as words of limitation, resulting in a *ejusdem generis* construction by which some persons whose civil rights have been restored in another manner have been deemed as not qualified to be jurors under this subsection. This limiting interpretation seems inconsistent with the intent of the Congress to exempt from disqualification persons who have been convicted of a crime but have subsequently had their civil rights restored.

The use of the language "pardon or amnesty" is clearly under-inclusive as an enumeration of methods by which civil rights may be restored. For example, there are at least two federal statutes which have the effect of expunging criminal records and might therefore be deemed to constitute a restoration of civil rights within the meaning of this subsection: the Youth Corrections Act, 18 U.S.C. § 5021, and the Comprehensive Drug Abuse Control Act of 1970, 21 U.S.C. § 844(b). Further, the laws of many states provide for the restoration of civil rights by a variety of methods. In addition, there is much confusion as to the exact meaning of the terms "pardon" and "amnesty" and as to the distinction between them. Some of this confusion became manifest earlier this year as a result of President Carter's pardon of certain persons who had been charged with or convicted of violating the Selective Service laws. It may be further inaccurate to describe amnesty as a restoration of civil rights, since its actual effect is to preclude prosecution in the first instance.

The Judicial Conference believes that the elimination of the limiting words, "pardon or amnesty," from this subsection will serve to clarify its meaning and to implement the legislative intent to restore eligibility for jury service to convicted persons upon the operation of any legally effective measure restoring their civil rights.

Facilitation of automated selection

Title IV of this bill would add to the definitional section of the Jury Selection and Service Act, 28 U.S.C. § 1869, two additional subsections providing definitions of the terms, "publicly draw" and "juror summons." These definitions are being urged by the Judicial Conference in order to clarify in law that the use of computer selection and automated data processing methods to expedite the process of random juror selection is permissible[13] and to take full advantage of its time-saving benefits. The Court of Appeals for the Fifth Circuit in *United States* v. *Davis*, 546 F. 2d 583 (1977), has resolved some of the questions arising under present law when computer selection of jurors is practiced. Particularly the Court of Appeals concluded in this case that the requirement of 28 U.S.C. § 1864(a) for juror names to be publicly drawn from the master jury wheel is met by a procedure whereby the actual drawing is conducted at a government regional computer center outside of the judicial district following the posting of notice within the district that the drawing will be open to the public and announcing its time and place. This is exactly the procedure which would be written into the law through the first proposed definition to be added by title IV.

The second proposed definition would clarify that the summonses issued to jurors under 28 U.S.C. § 1866(b) need not contain the actual signature of a clerk and seal of the court in the manner required for ordinary court process by 28 U.S.C. § 1691. In the larger district courts which summon a large volume of jurors an-

[13] About two-thirds of the district courts now employ automated data processing machinery wholly or partially in their jury selection procedures. The use of such automated procedures is already expressly authorized via 28 U.S.C. § 1869(g).

nually, many of the benefits of the automated selection process would be forfeited if each summons mailed to such jurors had to be signed by hand and have the seal affixed. Therefore this amendment would expressly provide that juror summonses may validly be sealed by a preprinted or stamped seal and may contain the name of the issuing clerk in typed or facsimile manner in lieu of an actual signature. Since juror summonses are of an entirely different character from ordinary court process requiring citizens to submit to the jurisdiction of the court as parties or witnesses, it is the view of the Judicial Conference that a facsimile signature and seal would be entirely sufficient to authenticate summonses to compel jury service.

FEDERAL EMPLOYEES COMPENSATION ACT COVERAGE

The final provision of this omnibus jury bill would extend to all federal jurors the protection of the Federal Employees Compensation Act, the provisions of which are found in chapter 81 of title 5, United States Code. In the past, serious problems have arisen when jurors incurred injury or disablement while performing their jury service. What begins as the fulfillment of a high duty of citizenship could be turned into an economic catastrophe or at least an inconvenience for the juror in the event of an accident or injury occurring within the scope of his jury service. The Federal Employees Compensation Act provides with respect to government employees that the United States shall pay compensation to them for disability or death resulting from personal injury sustained in the performance of their duties and not caused by their willful misconduct.

The Congress has already acted to make the protection of the Federal Employees Compensation Act applicable to federal employees during such time as they may be performing jury service.[14] Nevertheless the Department of Labor has consistently rejected the claims of federal jurors not regularly employed by the government for injury compensation under this Act on the basis that they do not come within the definition of "employee" contained in 5 U.S.C. § 8101(1). The Judicial Conference believes that strong policy reasons exist for bringing all federal jurors within the coverage of the Federal Employees Compensation Act. Jurors provide a valuable service to the government. While in actual service, the citizen-juror should rationally be accorded the benefit of protection in case of a service-related mishap. Presently a person injured while serving on jury duty could not recover compensation except by proceeding under the Federal Tort Claims Act, which would require that he bear the difficult burden of establishing negligence in a government agent.

The proposed amendment which would be made by title V of S. 2074 would not place jurors in an employment relationship with the government or characterize them as employees for any other purpose than compensation for injuries resulting from their service. The coverage would apply to a petit or grand juror in actual attendance at court or sequestered by order of a judge such as to be entitled to attendance fees under 28 U.S.C. § 1871. The juror would not be covered by the Federal Employees Compensation Act during his travel to and from the courthouse except when he is under sequestration order or otherwise traveling under order of the court for the purpose of the taking of a view. It is the position of the Judicial Conference that this amendment would improve the conditions of federal jury service by contributing to a juror's peace of mind, especially in the case of the timorous juror serving in a protracted case or in circumstances where he or she must be sequestered or transported for the taking of a view.

S. 2072—ABOLITION OF MILEAGE EXCUSE

This bill is also supported by the Judicial Conference and was approved at its September, 1976 session upon the recommendation of its Committee on the Operation of the Jury System. It would amend section 1863 of title 28 by eliminating therefrom subsection (b)(7). This subsection now provides that the jury selection plans of the district courts shall, among other things, "fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held." Under this subsection about two-thirds of the district courts have

[14] Act of Sept. 7, 1974, Public Law No. 93-416, 88 Stat. 1142. Senate Report No. 93-1081 on that legislation evidenced agreement with the March, 1974 resolution of the Judicial Conference urging extension of this legislation to all federal jurors.

elected to provide in their selection plans for an automatic excuse from jury service to be available upon request by any prospective juror who resides beyond a given distance from the place of holding court. As a matter of practice, such a request is normally made via the juror qualification form which is mailed to persons whose names are selected from the master jury wheel.

The Judicial Conference Jury Committee has recently had occasion to consider whether the "mileage excuse" provision of section 1863(b)(7) might be deemed inconsistent with the requirement of section 1861 that juries shall be "selected from a fair cross section of the community." This question arises because the employment of a blanket excuse based on mileage and available to all prospective jurors beyond a given radius from the courthouse might have the effect of skewing the representation of juries by automatically eliminating upon request the residents of particular geographical areas. Experience has shown that most prospective jurors eligible for the mileage excuse will exercise their right to it, with the frequent result that only a relatively small portion of the geographical area of a judicial district will be represented on juries.

We are not aware of any judicial decisions holding that the elimination of prospective jurors on a geographical basis in this manner is violative of the "fair cross section of the community" guarantee of section 1861 or of the Sixth Amendment guarantees respecting trial by jury in criminal cases. Nevertheless the Judicial Conference has concluded that it is unwise from a policy viewpoint, if not on a legal or constitutional basis, to permit the district courts in their selection plans to establish specific mileage or travel distances as the basis for an automatic excuse from jury service. The employment of such a practice might decisively influence the makeup of juries ultimately impaneled, for the reason that most places of holding court are in relatively urbanized metropolitan areas. Thus the mileage excuse will tend to eliminate those citizens residing in the less developed and more rural portions of judicial districts lying beyond the distance from the courthouse which is specified in the selection plan as the basis for a mileage excuse.

The repeal of section 1863(b)(7) would not mean, of course, that excuses from service could no longer be granted to prospective jurors on account of hardship in travel resulting from the distance from home to courthouse. Rather the adoption of this amendment would require that requests for such excuses be evaluated by the courts on an individual, case-by-case basis as to whether a showing of "undue hardship or extreme inconvenience" has been made under the circumstances. The Judicial Conference believes that this is the proper manner of handling requests for excuse from jury service based upon distance, and that it will avoid any negative implication for the representativeness and cross sectionality of juries which might result from the employment of a blanket mileage excuse available upon demand to all residents of a given sector of the judicial district.

S. 2049—WITNESS FEES

The Judicial Conference at its recent session of September 15–16, 1977, endorsed this bill, which contains the proposals of the Department of Justice to increase the compensation payable to witnesses in the federal courts. For this purpose the bill would amend section 1821 of title 28. An attendance fee of $30 would be provided for each day of attendance and for the time necessarily occupied in going to and from the court. This represents a 50 percent increase over the present $20 attendance fee and is identical to the fee increase proposed for federal jurors by S. 2075, as outlined above. With respect to the travel and subsistence expenses payable to witnesses, this bill also adopts a similar approach to that of S. 2075 regarding the payment of such expenses to jurors. Section 1821 would be amended to delete the specific monetary amounts specified for these purposes and to provide instead that witnesses shall receive either the actual cost of travel by common carrier or a travel allowance for travel by privately owned vehicle equal to that which applies to official travel by government employees generally under 5 U.S.C. § 5704. Subsistence allowances to witnesses who must be away from their residences overnight would be payable in the same amount set for government employees in official travel status.

We believe that it is sensible and desirable to maintain parity between the compensation provided for jurors and that pertaining to witnesses under section 1821. Such parity has existed for some years, and in fact section 1821 was last amended by section 102(b) of the Jury Selection and Service Act of 1968 to set the compensation of witnesses at its current levels. The same economic

arguments justifying increased compensation for jurors are clearly applicable to witnesses as well, as the Department of Justice has pointed out. Accordingly we support this bill enthusiastically.

I should emphasize that the Administrative Office is not involved in the payment of witness fees and that we have no appropriated funds for that purpose. Such fees are paid by the private parties to litigation or, in the case of witnesses subpoenaed on behalf of the government, by the Department of Justice. In criminal cases, besides paying the fees of witnesses for the prosecution, the Justice Department under Rules 15(c) and 17(b), Federal Rules of Criminal Procedure, also pays from its appropriated funds the fees of witnesses called on behalf of defendants unable to pay the fees therefor. See the decisions of the Comptroller General of the United States at 53 Comp. Gen. 638 (1974) and 39 Comp. Gen. 133 (1959). We therefore defer to the Justice Department as to the various questions of administering the payment of witness fees which are addressed by this bill.

S. 2016—UNITED STATES MARSHALS' FEES

This bill also addresses a subject which primarily concerns the Department of Justice rather than the Administrative Office. Although the United States marshals are the marshals of the district courts and perform various important duties respecting those courts and the judges thereof, they perform their work under the administrative supervision and direction of the Attorney General of the United States as provided at 28 U.S.C. § 569. Accordingly, the matter of their fees is within the jurisdiction of the Justice Department inasmuch as it is the appropriated funds of that department which pay the salaries and expenses of United States marshals.[15] I should also point out that the Judicial Conference has not had the opportunity to consider this bill and express its position thereon.

The bill would amend section 1921 of title 28 with respect to the fees collectible by United States marshals and taxable as costs in litigation. Since this statute has not been amended since 1962, it is apparent that the fees specified therein are undoubtedly in need of revision in view of the altered value of the dollar since that time. The amendment made by this bill would delete from section 1821 the specific dollar amounts specified as fees for the various services performed by the marshals. Instead it would delegate to the Attorney General the power to prescribe such amounts by regulation. For services in criminal cases the bill would extend the provision of present section 1821, which states that fees for such services may be fixed by the court.

The delegation of regulatory authority to the Attorney General to prescribe the marshals' fees seems to be a sound policy in that it would avoid the necessity for a statutory amendment whenever these amounts require adjustment. This approach is analogous in a sense to that of the juror and witness fee bills in providing for travel and subsistence allowances to be fixed by administrative action at amounts not exceeding the allowances payable to federal employees on official travel. Additionally, the delegation of this sort of regulatory authority to the Attorney General raises no legal or procedural problems which we can envision. Beyond that, I am not in a position to comment further with respect to this bill.

Mr. Chairman, this concludes my formal statement. I would again express our appreciation for the opportunity to appear, and I shall at this time endeavor to respond to whatever questions there may be.

Mr. IMLAY. First, I shall address myself to S. 2075, which is a bill to increase the fees and expenses payable to Federal jurors and to provide a statutory statement of their right to continued employment following jury service.

The present attendance fee for jurors has not been adjusted for 9½ years. In view of the increase of approximately 75 percent in the consumer price index since that time, and an even larger increase in the cost of gasoline for automobiles and of transportation generally, an increase in the compensation payable to jurors serving in the U.S. district courts is long overdue.

[15] See 28 U.S.C. § 567. See also the Department of Justice Appropriation Act, 1978, Public Law No. 95-86, title II, 91 Stat. 425.

The U.S. Senate has recognized this need by twice passing bills which would have provided this relief in the 93d and 94th Congresses. Neither of these bills was acted upon by the House of Representatives.

Meanwhile, the economic situation of the citizens summoned for Federal jury service continues to deteriorate. The juror receives an attendance fee of only $20 per day, the same figure as 9 years ago. This $20 is subject to taxation. From this $20, the prospective juror must frequently pay for a work substitute—a lady who has a child at home, has to pay for babysitters—and this fee of $20, when you consider that service on a jury may extend a considerable length of time, has become inadequate.

The juror is even more severely hurt by the inadequacy of his reimbursement for travel and for subsistence expenses. Under 28 U.S.C. 1871, he may be reimbursed for travel expenses at a rate of only 10 cents a mile, whereas a Federal employee on official travel status is now entitled to receive 17 cents a mile for travel by private vehicle. That figure is based, Mr. Chairman, on studies by the General Services Administration which have computed 17 cents a mile as the actual expense of operating the average motor vehicle today.

Since jurors frequently must travel a long distance in miles, particularly in Western and Southwestern States where the distances are great or where they have to be summoned from throughout a large judicial district to one central place of holding court, as they must be frequently for grand jury service, this 10-cents-a-mile rate has not been adequate. Because it has not been changed in 20 years, this is an obvious source of legitimate complaint, particularly for a juror who has to pay, out of his own pocket, part of his travel costs to come to court.

When he is forced to remain overnight at the place of holding court, which is very common, the juror is also severely hurt by the meager statutory subsistence allowance of $16 per day. From this $16 rate which is currently in effect, he must pay for a hotel room and for his three meals. In a high-cost city like New York, you can imagine what the result would be. A hotel room and three meals could not be found at those prices in that city, where we give the Government traveler the right to claim actual expenses up to $50 per day. The Government employee in travel status is entitled to a per diem allowance of $35 per day.

In 22 designated high-cost areas, he may claim actual, necessary expenses on a higher scale, depending upon the area, up to a maximum of $50. These figures contrast with the jurors' flat statutory rate of $16 per day under the present version of section 1871.

Each year which passes makes the problem of inadequate juror compensation more severe, and the Judicial Conference has again expressed itself, just a week ago, as to the extreme need for this legislation. Its concern echoes the report of your committee, S. Rep. No. 94–400 on S. 539, at the time of the passage of that bill by the Senate in the 94th Congress 2 years ago.

I should like to summarize quickly the changes which would be made by S. 2075 in the compensation payable to jurors:

(1) A 50 percent increase in the daily attendance fee from $20 to $30. This $30 figure would coincide with that provided in the witness fee bill which is being advocated by the Department of Justice.

(2) Continued provision for the payment of an enhanced attendance fee of an additional $5 per day for jury service of long duration. This would apply to those jurors serving more than 30 days on petit juries in hearing a single case, and to grand jurors after 45 days of actual attendance. Incidentally, a regular grand jury can be required to serve for as long as 18 months. It is possible for a special grand jury, impaneled under the Organized Crime Act, to be held for a period of up to 36 months. So you can imagine the financial consequences that would result from the present pay scale for a person who is held up to 3 years in service on a special grand jury.

(3) A travel allowance for jurors would no longer be set by statute in an absolute amount, but would instead be equated to the rate of reimbursement set by the Director of the Administrative Office of the U.S. Courts for supporting court personnel in travel status. This authority to regulate travel expenses for judicial employees is exercised by the Director pursuant to section 604(a) of title 28 and section 5707 of title 5. The travel rate for court personnel, as well as all other government employees, is presently set at 17 cents a mile, as indicated before.

(4) A grant of authority to reimburse jurors for necessary parking expenses, at the discretion and with the approval of the local district court in which they serve. This is something which we urgently need. We presently have problems, arising not only from the fact that jurors sometimes cannot get in and out of court because there is no authority to reimburse them for commercial parking, but because jurors are frequently released at late hours of the evening, at a time when it can be dangerous for people to walk outdoors. A number of our Federal courthouses, unfortunately, are located in portions of cities where it is not safe to walk at night. I am sorry to have to say that, but it is true.

(5) As for the subsistence allowance, again we would under this bill regulate that amount according to the scale of the Government traveller. That scale, in turn, is regulated according to economic studies by GSA of the actual living and lodging expenses in various localities.

(6) Express authority would be given to expend funds at the discretion of the district judge for the comfort and convenience of jurors who are sequestered for sensitive and lengthy trials. We have these spectacular cases where the judges have to sequester jurors, often making them virtual prisoners. They have to be kept together in a hotel. Frequently, it is necessary to move them around, take them to church, take them home so that they can do their laundry, or sometimes just to provide a change of scenery. This bill would give discretion to the court for reasonable expenditures incident to the locking up of a jury for an extensive period of time.

(7) Authority would also be granted by this bill to pay the actual fare of public transportation, such as subways and municipal buses, where the distance covered in miles is not proportionate to the fare. This is for the situation where the 17 cent rate per mile would not buy you a subway or a bus ticket. We then would provide for the payment of the actual cost of a subway or bus ticket in a metropolitan area.

Another problem of jury service is that the juror is all too frequently worried as to whether he is going to have a job waiting for him when he gets back from jury service. This fear haunts many jurors. They

frequently receive communications from employers indicating to the juror that if he goes on extensive jury duty, then he is told that he might not have a job when he comes back, or that he might be fired, or that he is fired.

Section 3 of this bill would add to title 28 a new section 1875, which would require that an individual who has been absent from employment to serve as a juror in the Federal courts, and who attempts thereafter to return to his prior employment, shall, if still qualified, be restored to a position of like seniority, status, and pay to that which he held before jury service.

Senator DeConcini. Mr. Imlay, may I interrupt you a moment? Do you know of any studies or surveys that give you any specifics as to how often that is abused or occurs?

Mr. Imlay. We have not really found this problem to be amenable to any such studies, Mr. Chairman. We have introduced various letters of this sort from jurors into the record of the first hearing we had before the House Judiciary Committee on this subject in 1971. They are printed in the report of the 1971 hearings. I can say in addition that we very, very frequently hear of this problem from the courts or from jurors directly. We refer such complaints to the Civil Rights Division of the Department of Justice, or we communicate with the chief judge of the district court concerned.

I know also that Judge Sugarman, formerly chief judge in the southern district of New York, told me that he spent a great deal of time calling employers and telling them that they were interfering with court processes if they told a juror that he would be fired for performing his civic duty as a juror.

Also, two of the courts have recently held that it is a criminal contempt of court for an employer to treat a juror in this manner.

Senator DeConcini. What is the name of the judge?

Mr. Imlay. That was Judge Sidney Sugarman, former chief judge of that very large district court in the southern district of New York.

Senator DeConcini. Where would we reach him now? Is he still on the bench?

Mr. Imlay. No; Judge Sugarman passed away in 1974 after having retired to senior judge status in 1971.

Senator DeConcini. Are you personally familiar with such complaints?

Mr. Imlay. Yes, I am. We have five such examples here in our file today, Mr. Chairman.

Senator DeConcini. What do they involve?

Mr. Imlay. They involve communications between employer and juror.

Senator DeConcini. And you have copies of those communications?

Mr. Imlay. Yes; in addition to those that are in the House judiciary record of 1971.

Senator DeConcini. Do you have any objection to putting those in the record?

Mr. Imlay. No objection. We might suggest that the names be deleted, as they were by the House Judiciary Committee.

Senator DeConcini. Yes; we can do that. We would appreciate that. I would like to review those. Without objection, the material will be inserted in the record at this point with the identification of the employees deleted.

[Material to be supplied follows Mr. Imlay's testimony.]

Mr. IMLAY. One of the judges has held that it is a contempt of court for an employer to threaten a juror—Judge Charles Joiner of the Eastern District of Michigan—and another one of these complaints is on appeal to the Fifth Circuit now and should be resolved soon. But there is a real difficulty in proceeding by way of contempt in these cases because of the issue of proof and also because many times jurors are too intimidated to bring the employer's actions to the attention of the court.

When we originally went to hearing on a similar proposal back in 1971, we were urging a criminal sanction against employers. The Department of Justice and the Civil Rights Commission testified that they would prefer a civil remedy because it is easier to prove and does not carry the very difficult burden of criminal proof.

Senator DECONCINI. Would you say that the majority of the complaints that you are aware of are bold-faced threats of losing jobs, or are they veiled?

Mr. IMLAY. Both. Many of them are bold-faced threats and actual firings.

You have to recall also, Mr. Chairman, that besides these specific situations, we also frequently have the juror who comes to serve and does not know whether he is going to have a job when he goes back, or not. It is this abiding, brooding potential threat to his livelihood and his family which often makes him seek an excuse from service or makes him a less than adequate juror if he is sitting around deliberating a case and he is scared to death.

We would also urge the provision that a civil penalty be provided, as set forth in our prepared testimony, which is fully explained therein.

Another feature that I might emphasize here is one that would insure fairness to the employer himself. We would urge the creation, as this bill provides, of a different form of temporary excuse for the juror who is working for the small employer, or the small farmer, or working for a business that would suffer from his leaving. We would provide that there should be a basis for a temporary excuse based on undue hardship and extreme inconvenience, including hardship to the employer if the absence of that juror from the small business would demonstrably hurt the business at that particular time.

This is both, then, a remedy for employers and employees because it will help the small businessman. This is not always possible now. When we call a juror from a small business, or from a farm, or from a ranch, the employer sometimes may get hurt because there is no such provision that the courts may recognize intermittent hardship to the employer as the basis for the temporary excuse of his employee from jury service.

We think that these reforms would certainly assist in obtaining more representative juries than we have at present and would allow persons, particularly those at the bottom of the economic ladder who are dependent on a daily wage, to come to court and to be reasonably compensated without having to beg off on the basis of economic hardship. Also, Mr. Chairman, not only would we be able to get jurors who would otherwise have less than adequate means of support, but we could also encourage prospective jurors to come from a farther distance to the place of holding court with these provisions. At present, with inade-

quate per diem and inadequate travel allowances it is very difficult for the rural resident—the person who lives some distance from the court center—to attend court. This would add a democratic and representative aspect to the jury system by allowing the person who lives far beyond the limits of the city where court is held—who lives in the outlying rural area of the judicial district—to attend court.

In Brooklyn, N.Y., now, they have a 25-mile jury excuse provision.

Senator DeConcini. Is that automatic?

Mr. Imlay. Yes. You can claim an excuse from attending court in Brooklyn now if you live more than 25 miles away from the courthouse.

Senator DeConcini. How do you physically do that? Do you write a letter stating you live 25 miles away?

Mr. Imlay. Yes. That is correct. But before the summons is issued, you can say on your juror qualification questionnaire that you want a permanent excuse. If you live more than 25 miles from court, you get excused. This recognizes the fact that if you live out on Long Island, it is an economic hardship to go to Brooklyn to attend court. The same thing is true, and probably in greater degree, in your own State, Mr. Chairman, and in the western district of Texas, for example, where it is 750 miles from one corner of the western district of Texas to another. Think of the distances between El Paso and Austin and San Antonio.

Senator DeConcini. Do you know what the rule is there?

Mr. Imlay. There, the judicial district is broken down into divisions. But we still have a problem in Texas because it is often very inconvenient logistically to get to court.

The fifth circuit has not allowed its district courts to establish a mileage excuse because it is the fifth circuit's position that juries might be geographically unrepresentative if such an excuse were operative.

Senator DeConcini. So it is done on a case-by-case basis in the fifth circuit?

Mr. Imlay. Yes.

Senator DeConcini. If it is done on a case-by-case basis, as this bill provides for, would that require a juror to physically appear, or can he make his argument in writing?

Mr. Imlay. He would get a temporary hardship excuse, after he is summoned. He would get a summons. Then he would communicate to the court his problem. He could do it in writing.

Senator DeConcini. He would not have to appear?

Mr. Imlay. No. If it is a hardship for him to come into court, he could do it all in writing. We even have Code-a-phone devices, and the jurors can call in their excuses, and they will be taken down by an automatic recorder for subsequent transmission to the court, which will consider the request.

Senator DeConcini. Thank you.

Mr. Imlay. The second bill, S. 2074, is an omnibus bill containing five separate proposals. Each of these proposals has been recommended by the Judicial Conference to the Congress. All of them have been introduced in prior Congresses without further action, and the Judicial Conference urges their consideration and passage now in consolidated form.

The first change which would be made by this bill would be the standardization of the size of civil juries in the U.S. District Courts as 6-person juries. The requirement for a unanimous jury verdict would be preserved, unless there is a stipulation to the contrary. In line with the reduced size of the civil jury from that which was traditional at common law, the number of preemptory challenges available to each party under 28 U.S.C. 1870 in civil cases would be reduced from three to two.

The reform which would be made by title I in the size of the civil jury is not new, for it has already been effected in 80 out of the 94 Federal judicial districts by local rule of court. Nevertheless, the Judicial Conference still believes that legislation on this subject is desirable in order to create complete uniformity in the Federal system as to the size of the civil jury. In civil cases, which are essentially controversies between individual private parties and lacking the stronger public interest implications which are presented by criminal cases, the purpose of the jury is more to provide an impartial and disinterested fact-finding body than to impress upon the resolution of the case the values and interests of the community.

Furthermore, the enactment of the Jury Selection and Service Act of 1968, with its requirements for random selection of jurors from voter lists, has greatly increased the ability of the Federal courts to achieve the selection of juries representative of a cross-section of the population. This can now be done as well through 6-person juries as it could formerly have been with juries of the traditional 12 persons.

Any doubts which might have arisen as to the constitutionality under the seventh amendment of a compulsory reduction in civil jury size were put to rest by the Supreme Court in its 1973 decision in the case of *Colgrove* v. *Battin*, holding that the seventh amendment preservation of the common law right to a jury trial did not engraft into the Constitution the right to be tried by any specific number of jurors. The Supreme Court, in this case, further noted the existence of empirical evidence to the effect that reducing the size of juries produces no discernible differences in the results arrived at.

I would emphasize that this bill applies only to the size of juries in civil cases. We are not suggesting any diminution in the size of the criminal jury. In a criminal jury context, the public has an immediate and direct interest in being represented in the courtroom. There, an injury has been done to the public. It is very appropriate, under our republican form of government, that the jury have a voice in the judicial process. Nevertheless in a civil case where the issue is essentially between two private parties—Which car entered an intersection first? What is the size of the damages to be paid to an injured person?—the solution can just as adequately be reached by the 6-person jury as by the 12-person jury.

There is a vital difference between the seventh amendment and the sixth amendment in this aspect of jury size. We think that this should be made uniform in those courts that have not adopted the 6-person jury.

Senator DeConcini. Is it true that some 80 districts have adopted it? Is that correct?

Mr. Imlay. That is correct. The exact number according to our records is 80.

Senator DeConcini. Are all of those 6-person juries, or do some of them vary?

Mr. Imlay. The Western District and the Middle District of Pennsylvania utilize 8-person civil juries. What they have done is to build into the jury two alternate jurors. They operate under that system.

Senator DeConcini. Did your office give any consideration to more than six? How did you arrive at the number of six?

Mr. Imlay. The Judicial Conference set that policy. Why the number six, I am not quite sure. There have been six-person juries before. There have been several Law Review articles that heralded the use of the six-person jury, some of them by jurors, and many judges have written on this subject. The six-person rule has been adopted by the overwhelming majority of courts having a local rule on this subject.

Senator DeConcini. Of course, the U.S. Supreme Court has held that six people do represent the community. Do you have any evidence since that 1973 case that would dissuade that?

Mr. Imlay. I think our best evidence, Mr. Chairman, is this. Dealing with six persons is far more streamlined, as far as time is concerned. Time is of the essence because we have a tremendous civil case backlog in this country. The courts have had to put the civil dockets on the back burner. In 14 of our courts, they have either had to declare a moratorium or have had to slow down the trial of civil cases, because of this tremendous urgency placed on the courts by the Speedy Trial Act which requires that criminal cases be tried very quickly.

I think the best evidence of the situation is in our own statistics, which I will be very pleased to introduce into the record.

Senator DeConcini. We would like to have that. Without objection, it will be inserted in the record at this point.

[Material to be supplied follows Mr. Imlay's testimony.]

Mr. Imlay. When we are talking about reducing the size of juries, we are not just talking about reducing the actual jury, but we are talking about reducing panels that have to be sent to a jury pool, we are talking about reducing venire lists that go out that require people to come to court, and we are talking about the ease of getting people in and out of a jury box at every intermission, and the ease of circulating among the jurors exhibits that are passed around continually during civil trials.

Senator DeConcini. Was any thought given to possibly an ultimate approach of 6 jurors, but if one of the parties objects and files a petition, then they can have 8 or 9 or 10, or some other figure? Had that process been considered, do you know?

Mr. Imlay. Not exactly, Mr. Chairman.

You see, the reduction in the size of juries is not really new. We have had a rule for many years that, where the parties would consent, we have allowed less than 12-member juries to be empanelled.

Senator DeConcini. That requires a local rule, does it not?

Mr. Imlay. No, rule 48 of the Federal Rules of Civil Procedure permits the parties to consent to civil juries of less than 12 persons. The local rules which we have been discussing apply to situations where consent is not obtained.

But, we would certainly have to send in large panels if the parties could regulate the size of juries. Then we would have to send out summonses weeks and months before the jury sat.

Senator WALLOP. Can you shed any light on which 12 districts have not adopted the rule, and why? What I am trying to get at is this. Is there some reason within those 12 districts as to why they feel compelled to maintain the 12-person jury rule?

Mr. IMLAY. We have not exactly determined the precise reasons, which vary from district to district. Following the Supreme Court's decision in *Colgrove* v. *Battin*, which gave a constitutional basis to the six-person jury, it was pretty much a matter of local option with the courts.

We have not attempted to get a rationale from those 12 courts precisely. I know that the Federal district court in Detroit, for example, has maintained a 12-person jury, except where the parties will accept a lesser panel. So it has been a local option. We have not attempted to divine a rationale.

Senator WALLOP. Is there any indication that those other 12 are not moving toward it? Is it really necessary to get a mandatory uniformity?

Mr. IMLAY. I think it would be useful rather than to let the situation stand as it is. Without any compulsion, we have no way to regulate these courts administratively, and we are asking that the principle of uniformity be applied by Congress.

Senator WALLOP. So the answer to my question is that there is no movement in that direction? You have 82 out of 96 in 3 years, so it would seem that there is a definite trend that way without the Congress getting involved in it.

Mr. IMLAY. No. We have assumed that if they were going to move that way, they would have all moved that way by now. It has actually been 6 years now since the original Judicial Conference recommendation on this subject.

Senator DECONCINI. Senator Wallop, if you would yield? I think that is a valid point. You have done a good job of persuading them and encouraging them to do that—82 out of the 94 districts now do it. Is it really necessary to mandate it for the 12 that have not?

Mr. IMLAY. Mr. Chairman, we think that with respect to the institution of the jury there is a certain merit in achieving uniformity—national uniformity. In these days, we have sort of a transient group of attorneys who go from district to district trying cases. The venue of a case will often lie in more than one district, particularly when corporations are involved. It would be desirable, I think, to have an identity of procedure in this area.

Senator DECONCINI. Let me ask you another question along Mr. Wallop's line of questioning regarding uniformity.

Under the local rules of a district that adopts a rule which provides for juries of less than 12, is that mandatory once it is adopted?

Mr. IMLAY. Once the rule is adopted, it is mandatory.

Senator DECONCINI. If you are in a district where you can have a jury by six or by eight, and neither party has any objection to that, they cannot file an objection once that rule is promulgated. Is that correct?

Mr. IMLAY. That is correct, yes.

In the other districts, they will have less than 12 jurors only where both parties agree, by stipulation.

We do not emphasize the saving of money. We emphasize that this would streamline and speed up the judicial process, which is stagnating right now in the civil area. We do mention, of course—because it is always relevant to the taxpayer—that our total billings for jury costs are somewhere around $20 million now. This, to us at least, represents a large amount of money, and we do emphasize this as a secondary proposition.

Senator WALLOP. If you do not emphasize the money, can you give us any statistical justification that those 12 districts which have not gone to the 6-man rule have a greater backlog in the civil cases than the other 84 districts?

Mr. IMLAY. We have not made that conclusion as yet, sir. There are so many other factors influencing the rate of disposition of civil cases.

Senator WALLOP. Surely that is the root of the argument, is it not?

Mr. IMLAY. We certainly have shown this. In the last 6 years, we have been able, even though we have many, many more jury trials in the Federal courts, to cut down considerably the rate of increase of jurors summoned since the courts adopted the six-person jury.

Senator WALLOP. I appreciate that, but it seems to me that if your argument is that the decrease in the backlog is accomplished, and that is the reason for going to the 6-man panel, then you ought to be able to justify the fact that the 12-man jury districts—that is those that are left—are suffering from a greater backlog and more inefficiency than the others. It would seem to me that those in that district would be creating a model of efficiency which they felt was satisfactory.

Mr. IMLAY. We have not made any attempt to single out those courts or categorize them as backsliders, or anything of that sort. We have not made that precise type of study. We could do it.

Senator WALLOP. If that is the reason for going to this, then it seems to me mandatory that we have that knowledge. Otherwise, there is no reason for us to involve ourselves in that.

Mr. IMLAY. We would be glad to make that study. We can do it.

I might say this. There are many other influences on cases right now.

Senator WALLOP. I can appreciate that, but if the argument mandating uniformity is efficiency, then we ought to be able to prove that we will get some efficiency by mandating it. Otherwise, I do not think there is any point in our getting involved.

Mr. IMLAY. We will be glad to supply such a study to the committee.

Senator WALLOP. Thank you.

Mr. IMLAY. We will either do it ourselves, or we will get our Federal Judicial Center to do it.

Senator DECONCINI. How long would that take?

Mr. IMLAY. I would say 1 to 2 weeks.

Senator DECONCINI. That would be fine. Thank you. Without objection, the material will be inserted in the record at this point.

[Material to be supplied follows Mr. Imlay's testimony.]

Mr. IMLAY. Also, as I have said, Mr. Chairman, maybe we can introduce that section of our new annual report that deals with jury usage into the record at this point.

Senator DECONCINI. Yes; so ordered. Without objection, it will be inserted in the record at this point.

[Material to be supplied follows Mr. Imlay's testimony.]

Mr. IMLAY. Title II of S. 2074 would amend the present Jury Act at section 1863(b)(2), to establish a statutory presumption in favor of the use of voter registration lists or lists of actual voters as the exclusive source of juror names for the Federal district courts.

Such voter lists are now used as the exclusive source by 92 out of the 94 district courts. Nevertheless, there is language in the existing version of section 1863(b)(2) which has been troublesome because it suggests that the district courts might have to supplement the voter lists with additional sources in order to achieve the objective of the Jury Selection and Service Act that juries shall be selected from a fair cross-section of the community.

The problems with this view are twofold. First, there are generally no satisfactory supplemental lists of sources available which would improve upon the cross-sectional nature of the voter lists, as suggested by the legislative history of the Jury Act, and second, the decisional law has overwhelmingly established that the policies of the 1968 Jury Act are presently being successfully achieved by the district courts through the exclusive reliance on voter lists.

Thus, title II would amend section 1863(b)(2) to establish a statutory presumption that jurors selected from voter lists are representative of the fair cross-section of the community.

The amendment would further require that any district court seeking to utilize supplemental sources of juror names must first affirmatively find that the voter lists in that district do not represent such a fair cross-section of the population.

The option for the district courts to supplement their voter lists, when necessary, would remain. This, in other words, would make the voter lists presumptively a valid source for jury selection. Anybody who challenges them would have the burden.

Senator DECONCINI. Let me ask this question. Would that preclude, in your opinion, the court, on its own, establishing a rule or order to supplement the list?

Mr. IMLAY. It would not preclude it, Mr. Chairman. Any court could do it, especially any court finding that its master jury wheel is unrepresentative.

Senator DECONCINI. My point is, Does it takes someone to contest that and carry the burden, or can the court just decide on its own?

Mr. IMLAY. No, Mr. Chairman. No individual litigant would necessarily have to raise this. We periodically sample all of these jury wheels. The samples of the jury wheels are sent to our Federal Judicial Center which has all of the census data giving the breakdown of the population by race and by national origin within a given judicial district, and so the Judicial Conference is continually monitoring the cross-sectionalism of these master jury wheels.

No one litigant would have to carry the load.

Senator DECONCINI. So the district judge, on his own, could make a determination?

Mr. IMLAY. Exactly.

Senator DECONCINI. If the district judge makes that determination and decides to supplement the voter list with other available resources or lists, is that subject to appeal or challenge?

Mr. IMLAY. Each time that an individual court changes its district jury selection plan, that decision is subject to review by the judicial council of the circuit. So the circuit does monitor.

Senator DeConcini. Before being adopted?

Mr. Imlay. Before being adopted, yes.

This is all monitored—both at the circuit court level and by the Judicial Conference.

Senator DeConcini. Why is it necessary, under our bill, to establish a presumption?

Mr. Imlay. Because, under the present system, Mr. Chairman, any litigant can come in, however frivolous his objection might be, and say that supplemental sources of names should be employed because the wheel is unrepresentative. At that point, the court is obligated to come forward with all of the proof that is available to show that it is representative.

Many of our jury wheels are automated now. We have data computer systems which electronically program all of the master wheel and qualified jury wheels. So it does put a heavy burden on the court at the bare allegation of a litigant.

Senator DeConcini. Is that a substantial burden to answer those challenges?

Mr. Imlay. It very well could be, Mr. Chairman.

Senator DeConcini. If it is automated and properly programed, I would think it would be fairly easy to meet the challenge. But your experience demonstrates otherwise, is that correct?

Mr. Imlay. Yes.

We have not had a lot of litigation over this. I cannot say that we have. I think the 1968 act has proven to be a very fortunate act, but in several situations—such as in Colorado where the *Test* case was tried—there has been substantial litigation testing these jury wheels, and it does put the court to a heavy administrative burden to prove that it is in compliance every time that the challenge is made, in addition to adding judicial work in the necessity to resolve these challenges.

Senator Wallop. There is a California Law Review article which is entitled "Jury Representative—A Mandate for Multiple Source Lists," in which the authors state that "available studies indicate that voter registration lists do not represent a cross-section of our community and are underinclusive." The question that would come from that would be this: Is it not true that a great number of eligible voters do not register and do not vote? And is there validity in an argument like that?

Mr. Imlay. There are people who do not register to vote. I think the decision was made back in 1968 to use voter lists as the best source, with full recognition that they would not represent people who did not bother to register to vote. That is not a legally cognizable class, we do not think. But people who are interested in their civic duties generally are very well represented by the voter lists.

You can get a sample from a bucket as well as you can from a barrel, statistically. Voter lists are still an excellent source simulating the demographic distribution of persons geographically, by economic stratum, by race, and by national origin. We know of no better such source.

I personally went with a fifth circuit delegation around Washington to investigate this matter. We went to the Civil Rights Division at the Department of Justice, and we contacted the Civil Rights Commission. We said, "What lists do you have that are better than voter lists as a source of jurors?" They knew of none. You can point

to welfare lists, but that represents only one stratum of society. You can point to tax rolls. That represents another economic stratum of society.

Then Attorney General Ramsay Clark, back in 1968, said in substance: "The Department of Justice has surveyed every possible list. We can find none better than voter lists." The only situation that I know of recently where they have supplemented the voter lists with an additional source of juror names—except for the District of Columbia, which is a special situation—is in the district of Colorado, which determined that there might not be enough Hispanic names in the jury wheels and therefore added lists of licensed automobile drivers. The problem is that if you go to driver registration lists, you might get more Hispanic names into the system, but you might also find that there are more males who are licensed to drive, or you might find that automobile drivers represent a higher stratum in the economic scale. So you go to any other list, and you are adding a skewing factor affecting the representative nature of the wheel.

Senator WALLOP. But the voter list, itself, does not give any indication of race or economic status. Is that right? The voter list would not give you any indication of race or economic status, other than the presumption that if your name is a little queer, then it would have to be something different than somebody else's.

Mr. IMLAY. We pick that information up from the juror qualification questionnaire, on which prospective jurors are required by law to indicate their race and occupation. As I say, we have a sampling program to make sure that we are getting these various minorities, and that the selection process is cross-sectional.

Senator WALLOP. Thank you, Mr. Chairman?

Senator DECONCINI. Let me pursue this.

Do you have a demographic study, or have they made any studies where you take a voter registration list with so many names on it versus the community list with minorities listed, in terms of their economic status and their average incomes, and so on?

Mr. IMLAY. Mr. Chairman, what we do, essentially, is to test a sample of the jury wheels against the Bureau of the Census breakdown by race, sex, and economics, and by geographic distribution. So we do monitor that.

The further you get away from the census, which, of course, is only taken every 10 years, perhaps the less accurate that is. So our Federal Judicial Center is in the process, right now, of devising a more careful program of sampling.

Senator DECONCINI. How close do you come to the census? Do you recall?

Mr. IMLAY. It comes very close. The Jury Committee of the Judicial Conference which Mr. Burchill and I serve as staff, is constantly aware of and considering the problem of representation.

Senator DECONCINI. This obviously leads you to your conclusion that the voter registration is the best available list that there is. Is that right?

Mr. IMLAY. That is correct.

Senator DECONCINI. Please proceed.

Excuse me, Senator Wallop.

Senator WALLOP. How often are the lists challenged on this basis for unrepresentativeness In other words, do we need to do this, if

most people are doing it? Are they being challenged on the basis of using voter registration lists, or not?

Mr. IMLAY. There are challenges. We do not know just how many there are, but we do watch these various challenges.

One of them, of course, reached the Supreme Court in *Test* v. *United States*, from the District of Colorado. There are others. The Court has come forward with statistical data to show the representative nature of its wheels.

With the automation that we have now in most of the courts, it is much easier to sample than it was, but it can still be quite a burden and can lead to much fruitless litigation.

Senator WALLOP. Is it then necessary for us to put this into law, if the Court has come in to support it? Is this an exercise——

Mr. IMLAY. It would clarify the statute. It would make the administration of the statute more uniform. I think it would achieve a quality of certainty and consistency which would be desirable in the Federal court system nationally.

Senator WALLOP. Thank you.

Senator DECONCINI. Have there been attempts, to your knowledge, of using multiple lists, other than in Colorado and the District of Columbia?

Mr. IMLAY. Only in the Federal courts of Colorado, and the District of Columbia, and the Canal Zone has a different system, I think.

Senator DECONCINI. What is the big objection to it, other than your assumption that the voter registration list is the best representative list? Is it difficult to administer, or to implement?

Mr. IMLAY. First of all, Mr. Chairman, we have found no list that does not create its own additional problems.

Senator DECONCINI. What if you took drivers' license lists, and welfare lists, and utility connections, and one or two others, and then put them into a computer? Do you think it would be better?

Mr. IMLAY. This creates an administrative nightmare because you are duplicating names. You have to make repeated purges of the listing to avoid the duplications in order to maintain a geographically proportioned master jury wheel. You need addresses, and you frequently will get this: For example, if you start dealing with vehicle operators' licenses, you will get the 16-year-old to 18-year-old group—all of whom have to be purged. There is also the duplication of those aged 18 and above.

If you start dealing with automobile licenses, you might get more males than the notion of representatives would allow, and you might get a higher economic stratum.

Senator DECONCINI. We thank you. We will have more testimony on this, too.

Senator Wallop?

Senator WALLOP. If it was done by computer, does it make that much of a problem?

Mr. IMLAY. We found that it does take a substantial reprogramming. We found that to be true in Colorado where, as I say, they added drivers' license lists.

And, it adds an element of doubt, really. It does not make the wheel more representative. It might well make it less representative.

Senator WALLOP. Thank you.

Mr. IMLAY. Another feature that we would urge is this. We would urge that the present language in section 1865(b) relating to pardon or amnesty be removed because there are many different ways that a person's civil rights can be restored after a conviction, and pardon or amnesty might not be applicable or exclusive. As a matter of fact, amnesty is a forebearance of prosecution and obviously does not restore anybody's rights.

There are various State laws which, through legislation, provide for the expunction of criminal records by operation of law. If a person has a good record for 5 years, and so forth, then there are many State laws which restore that person's rights.

We have two Federal laws which restore the rights of individuals. One relates to Federal youth offenders. If a Federal youth offender has his probation terminated early, or if his term of treatment is terminated early, by operation of law his civil rights are restored.

What we are trying to do here is to recognize reality and allow a person to serve as a juror if his rights have, in fact, been restored.

Former Deputy Attorney General Harold Tyler wrote a report for the Jury Committee and the Judicial Conference on this subject at a time when he was serving as a U.S. district judge. If the committee would be interested in his report, we would be glad to submit it on that point.

Senator DECONCINI. We would like to see it.

Mr. IMLAY. I think, Mr. Chairman, it is already in the record. As a matter of fact, it came with the transmittal letter that was sent to the Congress. We will have another copy for the staff, however.

Senator DECONCINI. Thank you. Without objection, the report will be inserted in the record at this point.

[Material to be supplied follows Mr. Imlay's testimony.]

Mr. IMLAY. Another change made by this bill would add to section 1869 two additional definitions. One would redefine the words "publicly draw." This is in connection with refilling the jury wheels. We do this by data computer in the majority of situations now. Those data computers are located in GSA's regional centers, but we also have other computer sources. It is obviously impossible to have a computer in every division of every district, so the mechanical aspect of the drawing is actually done outside of the district. So, our redefinition of "publicly draw" would clarify the fact that the public drawing might be outside of the judicial district. The fifth circuit, in an opinion, has already upheld that procedure, and it is cited in our testimony.

Another redefinition relates to the requirement of a clerk's signature and a seal of court on the juror's summons. This would be done automatically. Presently, we have been able to cut down on the clerical time of sending out jurors' questionnaires through the computer automation process. We have now programmed into the computers the master jury wheel and the qualified jury wheel, and the computers can print out the questionnaires and summonses to be mailed to persons randomly selected therefrom. This small change would allow the seal of court and the signature of the deputy clerk to be printed on the juror's summons, which we think is already legally permissible. But this would clarify that point.

Finally, Mr. Chairman, title V of this bill would extend to all Federal jurors who might be personally injured incident to their jury

service the same financial benefits which are enjoyed by Federal employees injured in the scope of their employment. The coverage of the Federal Employees' Compensation Act has already been extended, since 1974, to those Government employees injured during such time as they might have to serve on Federal jury duty.

This title would extend the same coverage to all the rest of the citizenry who show up for jury service in a Federal court and who are injured. This might happen when the jury goes to view the site of an incident involving litigation, it might happen where the juror is injured during deliberations or in entering or leaving the courtroom or courthouse.

We have had several episodes where jurors have been injured. All we can tell them is that they might have a remedy under the Federal Tort Claims Act, but that requires them to prove negligence on the Government's part. When we are locking up jurors for extended time, they are very much in the position analogous to employees of the Government. They should be financially protected if they are injured. We have been sympathetic to their plight, but we have had administrative rulings from the Department of Labor that jurors are not presently covered by the Federal Employees Compensation Act. This would cover them.

I have already mentioned that we urge the present statutory provision for mileage excuses to be deleted, and that persons who live too far from court be permitted, in lieu of an automatic mileage excuse, to claim individual hardship in travel. It might be a hardship for a person who is in a certain physical situation to travel 5 miles to court. It might not be a hardship for another person to travel 100 miles to court. In the States of Utah and Wyoming, it is not at all unusual for a person to do that. It is 500 miles from Cheyenne, Wyo., to the Yellowstone National Park. Distances out there are not commonly considered to be an obstacle. So, this is a variable that should be handled via the present mechanism for hardship excuses from jury service.

On the subject of witness fees, I will not take the time of the committee. We think there is a real logic in equalizing the witness fees with the juror fees. We think the Department of Justice has a very valid basis for its arguments that the witness fees should be raised.

We also think, as far as marshals fees are concerned, that they should be computed by an administrative determination instead of being statutorily set and inflexible.

I might say also that the Judicial Conference has endorsed the witness fee bill, but has not yet considered the marshals fee bill.

That concludes our statement, Mr. Chairman.

Senator DeConcini. Mr. Imlay, let me permit Mr. Altier to ask a couple of questions. He is one of staff counsel, and he has a couple of quick questions.

Mr. Alter. Several of the bills before us today deal with increases in fees for marshals, witnesses, and jurors. Is the Judicial Conference in favor of increasing the initial filing fee for a civil complaint?

Mr. Imlay. The Judicial Conference of the United States is in favor of changing the determination of the filing fee and making it a matter of administrative determination by the Conference rather than a

matter of statutory fiat. There is a draft bill which will be sent to the Congress at the beginning of the next session representing the Judicial Conference's position on that.

Mr. ALTIER. One of the bills before us, S. 2075, dealing with the subject of juror fees after a lengthy period of service and retains the discretion in the trial judge to order the payment of additional fees for additional days of service—beyond 30 days for petit jurors, and beyond 45 days for grand jurors. What would you say would be the advantages or disadvantages of having that imposed automatically, without requiring some sort of judicial discretion?

Mr. IMLAY. As far as we are concerned, there would be a considerable advantage in uniform and automatic application. The Judicial Conference has not addressed that precise point, however.

Mr. ALTIER. My last question has to do with the idea of having the juror fees adjusted administratively instead of requiring the Congress to come back and periodically revise that fee. Right now, the proposed bill before us suggests a change from $20 to $30 per day.

What are your thoughts on having this fee set administratively by the Director of the Administrative Office?

Mr. IMLAY. That also has not been addressed by the Judicial Conference. One answer is this. Putting in a $30 rate does establish uniform notice to the population generally, and jurors do come from the broad base of the population, and they can see and understand. They can read the $30 and know clearly that some bureaucrat in Washington is not adjusting the figure, but it is there in the law, and it does have that advantage. It also establishes parity with witness fees, as opposed to having them vary. But I have no strong position, one way or the other, without further Judicial Conference views.

This point was, I am sure, taken up by the Jury Committee of the Judicial Conference, and the Jury Committee, incidentally, represents all of the 11 circuits. I think they perceive some advantage in having the jury fee clarified in the statute, as opposed to the other administrative fees.

Mr. ALTIER. Thank you very much.

Senator DECONCINI. Thank you, Mr. Imlay and Mr. Burchill. We appreciate that fine testimony and your taking the time that you did.

[The materials referred to in Mr. Imlay's statement follow:]

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., October 3, 1977.

Hon. DENNIS DECONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery,
Senate Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR DECONCINI: This is in response to your letter of September 29th asking that we provide to the Subcommittee on Improvements in Judicial Machinery the reports on the operation of the jury selection process which are periodically required by the Judicial Conference to be submitted to the Administrative Office from the United States district courts under the authority of 28 U.S.C. § 1863(a).

By this authority the Judicial Conference has been requiring the district courts to submit reports as to the composition of their master and qualified jury wheels according to race and sex. This program is designed to permit the Conference, the circuit councils, and the district courts themselves to monitor the condition of the jury wheels in order to determine how they compare in a statistical sense with the actual composition of the population in that judicial district as revealed by census data. Such information is helpful in affording a basis to judge the degree

to which the mandate of the Congress that federal juries shall be selected "at random from a fair cross section of the community" (28 U.S.C. § 1861) is being met.

The present reporting program of the Judicial Conference in this regard makes use of the attached JS–12 form (revised 7/76) and requires the district court clerks to report the results of a random sampling of names from the master and qualified jury wheels. This sampling is made whenever the master and qualified jury wheels are emptied and refilled pursuant to the courts' jury selection plans (which must be done at least once every four years under 28 U.S.C. § 1863(b)(4)) and at any other time when the selection plans of the individual courts are amended to alter the selection or qualification processes for jurors in that court so as to affect the composition of the master or the qualified wheels. Since most of the district courts are this year performing the quadrennial refilling of their jury wheels, the latest results of this reporting program are only now being received. They have not yet been processed by the Federal Judicial Center, which has been assigned the task of analyzing the raw numerical data received from the courts and comparing it in a meaningful way with the corresponding census figures. Accordingly the data from the current reporting program will not be available for some months to come.

We do have available, however, the results of the last set of periodic reports which were received by the Administrative Office in 1974 following the refilling of jury wheels required by the law reducing the qualifying age for federal jury service to 18 years (Act of April 6, 1972, Public Law No. 92–269, § 3, 86 Stat. 117). The report and analysis for each judicial district will be provided by Mr. Burchill of my office to Mr. Altier of your staff. An explanatory memorandum from the Federal Judicial Center will accompany these reports and should be helpful in explaining the mathematical meaning of the various measures used.

There is one request which I should like to make on behalf of the Judicial Conference in the handling of these reports. The Conference has been of the view that they should be used exclusively for the purpose of monitoring the effectiveness of our present jury selection and administration techniques in achieving compliance with the mandate of the Jury Selection and Service Act of 1968, as amended. The reports have meaning only in this context, since they are based only upon a sampling from the jury wheels and are not therefore necessarily reflective of the composition of the juries actually serving in any particular proceeding. The Judicial Conference has thus not authorized the release of the reports to the public and has confined their distribution to the chief judges of the applicable circuit and district and the circuit executive and working jury committee of the circuit involved. I would therefore respectfully ask that the reports which are being provided be treated by the subcommittee and its staff as confidential and that no dissemination be made of them to any unauthorized person. I would also ask that we receive back the statistical analyses with respect to each district at such time as the subcommittee has completed its study and examination thereof.

I should point out further that the findings of this periodic study have been exhaustively reviewed by the Federal Judicial Center, the Committee on the Operation of the Jury System of the Judicial Conference, and the particular district courts and circuit working jury committees. Such a review was directed by the Judicial Conference (see the 1975 Report of the Proceedings of the Judicial Conference at pages 14 and 55). Although the statistical results with respect to most of the district courts were generally consistent with the makeup of the population in the judicial districts, any apparent significant discrepancies were explored in depth by the affected district court and circuit. In nearly every case the discrepancy in statistical findings was satisfactorily explained by some special local circumstance affecting the sampling results. The overall view of the Judicial Conference with respect to this set of periodic reports was therefore that they demonstrated in most instances a high degree of compliance with the dictates of the Jury Selection and Service Act as to how federal juries shall be chosen, and that such compliance would not be substantially heightened in the vast majority of districts by the supplementation of voter lists with other sources of juror names. This view is expressed in the enclosed report of a subcommittee of the Jury Committee which was chaired by Judge Walter P. Gewin of the Court of Appeals for the Fifth Circuit. It should be noted that this report was written with respect to the set of periodic reports submitted prior to the 1974 set which is being provided to you. It is fair to say, however, that the Jury Committee and the Judicial Conference would apply the views expressed by Judge Gewin's subcommittee in its 1974 report as well to the set of periodic

reports which were submitted in 1974 and analyzed in 1975 and which are now being transmitted to you.

I wish at this time to express my appreciation for the hearing which was afforded us last Monday before your subcommittee with respect to the jury-related legislation being urged by the Judicial Conference. We shall be corresponding further with you to provide additional information material to the questions raised at the hearing.

Sincerely,

CARL H. IMLAY,
General Counsel.

Enclosures.

THE FEDERAL JUDICIAL CENTER,
Washington, D.C., May 14, 1975.

To: Members of the Judicial Conference Committee on the operation of the Jury system.
From: William B. Eldridge.
Subject: Jury wheel study.

Enclosed is a copy of a memorandum sent to all addressees on the memorandum. Each Chief District Judge received reports on jury wheels within his district, (with a carbon copy going to the Clerk of the Court). Each Chief District Judge, Circuit Executive, and Circuit Jury Committee member received reports on all wheels within the circuit.

A hypothetical report is attached to the enclosed memorandum to illustrate the information given to all judges.

Enclosure.

THE FEDERAL JUDICIAL CENTER,
Washington, D.C., May 14, 1975.

Memorandum to: Chief Circuit Judges; Chief District Judges; Circuit Executives; members of Circuit Working Jury Committees.
From: William B. Eldridge, Director of Research.
Subject: Jury wheel study.

This memorandum is intended to aid you in interpreting the data you have recently received from the Administrative Office relating to the race and sex composition of the jury wheels and the communities served by those wheels.

I. WHAT YOU HAVE RECEIVED

A. Data on the jury wheels.

A sample was drawn in each jury wheel division and qualification questionnaires sent to all persons in the sample. A special effort was made to assure complete response to all addressees. Data from the returned sample questionnaires were provided to the Administrative Office by the district court clerk for each jury division within his district. This information is reported in Table I as "Master Wheel Sample."

B. Data on jurors reporting for duty

District court clerks compiled data during a six-month period on the race and sex of persons reporting for duty. These data often constitute a very small sample depending upon the number of trials scheduled. This information is reported in Table I as "Jurors Reporting."

C. Data on the community population.

The Census Bureau prepared a special tabulation for the United States courts showing the race and sex distribution for each of the geographic areas served by a jury division. The data are based on the 1970 decimal census; no later data being available, the information is reported in Table I as "Population 18 and Over."

II. WHAT THE DATA MEANS

A. Master wheel sample.

1. *Sampling error.*—Since the data come from a sample of returned questionnaires without regard to the qualification of the respondents, the result of the race and sex distribution is actually a measure of the source of names, usually voter registration lists. Since each master wheel is a random sample of the total registered voters, this data is a sample of a sample. All sampling involves some

possibility of error. Line 10 on the first page of the report gives a measure of the confidence in the samples of the master wheels at a specified error of five percentage points. A typical statement in line 10 will read:

"A sample of this size can be expected to yield a distribution within 5 percentage points of the actual jury wheel distribution 96 times out of a hundred."

This means that if we drew 100 samples of the master wheel (instead of the one sample actually drawn) only 4 would be more than 5 percentage points away from the true distribution in the master wheel. Thus if the master wheel actually has a 50 percent white and 50 percent nonwhite distribution, we would expect that 96 samples out of 100 would fall in a distribution range of 45 percent to 55 percent. The other four would fall in some larger range such as 43 percent to 57 percent or 40 percent to 60 percent or greater. The significance of this error range for policy decisions by the court will be discussed below.

2. *Race classification.*—All persons completing the sample questionnaires are required to identify themselves by race in one of the following categories: Indian (American), Oriental, Black (or Negro), White, Other. Where a respondent identifies himself as "Other," he is asked to specify race. In many cases (but an unknown number) the respondent identifies himself as "other" and then specifies in nationality or ethnic terms such as Mexican, Puerto Rican, West Indian, Hawaiian, etc. The Census Bureau allocates these ethnic identifications according to rules in which the census-takers are trained. Thus, they allocate Mexican and Puerto Ricans and others "suggesting Indo-European stock" to white; Jamaicans, West Indians and similar groups to Negro; and Hawaiians, Eskimos, Malays, etc. to "Other." It did not appear feasible to expect 94 individual court clerks to make these allocations in a consistent and reliable fashion. Thus, the master wheel data reports only "White" and "Non-white" in the tables that have been sent to you. White includes all those who so identified themselves. Non-white includes everyone else, including those who identified themselves as "Other." The Census data in Table One has been similarly aggregated into white and non-white. This means that the Administrative Office data and the Census data will differ to a varying degree from district to district since Census will have counted some people white who will have identified themselves as "Other" on the qualification questionnaire. It is expected that this will present a significant distortion in districts havng a substantial number of Mexicans, Puerto Ricans or other Latin groups who may have identified themselves as other than white, but whom Census will have considered white. Where the distortion exists, it will almost always result in an over-representation of non-whites in the master wheel as compared with Census data. Where such an over-representation appears, the district courts may wish to examine the questionnaries to determine if a realistic correction can be made by trying to follow the Census procedures.

B. Jurors Reporting.

1. *Sampling error.*—No statements about the confidence in the sample can be made with the data available from this survey. Simplified but more rigorous procedures will be followed in the future to assess sampling error in this area.

2. *Race classifications.*—The observations under II.A.2. above are also relevant here. To the extent that clerks reported race of jurors reporting for duty by consulting the qualification form, no new distortions should appear. However, if clerks were making their own judgments about race by observing those reporting for duty, the possibility of new distortions exists.

3. *Effects of qualification.*—Data on jurors reporting for duty necessarily applies only to those who have qualified, which introduces a new variable to confound the efforts to make comparison. It often happens that the race and sex distribution in the master wheel sample will differ substantially from that in the Census figures, but that this difference is markedly reduced in a comparison of jurors reporting with Census figures: sometimes the reverse occurs. The change may result from a difference in the propensity of race or sex groups to answer the summons. If the district has a firm policy on failure to report, however, we would expect such differences to be attributable primarily to the qualification standards in the district.

III. EVALUATING THE STATISTICS

A. Sampling Error.

The sampling error of five percentage points at the 95 percent confidence level (as described in II.A.1. above) is a widely accepted standard for accepting a sample as reliable. This does not mean, however, that five percentage points is the measure of disparity between community population and master wheel popu-

lation that the court should accept. This is a policy question to be decided by judges either in the establishment of standards or in case-by-case resolution of challenges. The impact of a plus-or-minus 5-percent difference must be seen in terms of the size of the base. Thus, if the community has a 50–50 distribution of white and non-white, a 5 percent tolerance has one impact. If the distribution is 95–5, a 5-percent tolerance would permit *no* representation of the minority group. The sample reliability for wheels in your area is shown on the enclosure.

B. *Chi-square Test*

A classical statistical measure of the probability that distribution across several variables could have occurrd by chance is known as Chi-square. This test has been applied to the data from each jury wheel on the distribution across these categories: White male; non-white male; white female; non-white female.

The distribution across these categories in the population of the community is known from the Census report. The Chi-square test compares the distribution in the master wheel sample with the distribution in the population and produces a statistical value of the difference between the two. If the statistical values does not exceed a mathematically established threshold, the statistician reports that the evidence is sufficient to support a conclusion that the wheel is non-representative of the communtiy. If the statistical value from Chi-square exceeds the threshold, the statistician reports that the evidence is sufficient to support a conclusion that the wheel probably does not represent the community. He will quantify his conclusion with a probability statement that says in effect: "If the master wheel is distributed like the population, the distribution observed in the sample could occur in only — percent of all possible samples drawn from that wheel. When that percent falls below five, the conclusion is that the master wheel probably does not represent the community."

Again, this quantification is only a statistical test of the similarity of the master wheel and the Census figures. Thus, if the statistician concludes that the wheel probably does represent the community, he is saying that by statistical standards you probably won't get better. Conversely, if he concludes that the wheel probably does not represent the community, he is merely saying that by statistical standards the probability of representation could be improved. The statistician's findings are reported on the attachment for the wheels in your area. They are offered for your information and should not be taken as a suggestion that the statistical thresholds are a measure of the difference between Census distribution and wheel distribution that should be tolerated by the courts, either through establishment of standards or case-by-case resolution. Courts should be aware, however, that challenges to jury wheel composition are likely to be made on the basis of such statistical measures as chi-square. The results from this test for wheels in your area are shown on the enclosure.

C. *Absolute difference in representation.*

One way of considering the adequacy of the representation of the community is to compare the percentage of the population that falls in some subgroup; e.g., whites or females, with the percentage of the wheel that falls into those subgroups and to determine that the differences are tolerable or not tolerable.

This is an inflexible approach that is likely to generate problems for the court in marginal situations. Judicial opinions, scholarly articles, and scientific critiques have suggested varying levels of absolute difference that might be tolerated. When the population distribution is nearly 50–50, the effect of allowing a ten percent absolute difference in the jury wheel distribution might produce a result acceptable to the court; that is, a wheel with 60 percent men and 40 percent women in a community that is approximately evenly divided might be tolerable. But when the issue is the representation of minorities, the absolute difference approach may become difficult to administer. If a community is 80 percent white and 20 percent black, a 10-percent difference in absolute percentages would find satisfactory a wheel with a white-black distribution of 90–10. Indeed, in many districts minority groups will be small enough for a 10-percent absolute difference test to accept wheels in which the groups are completely unrepresented. Courts should look at the absolute difference in each jury division, but should examine potential impact of settling on an absolute difference test. The absolute difference for wheels in your area is shown on the enclosed summary.

D. *Proportional difference in representation.*

Another way of looking at the data is to consider the proportional difference between the representation of subgroups in the wheels and those subgroups in

the community. Thus, if our community of 50 percent males and 50 percent females yields a jury wheel of 50–50 for the male-female distribution, each group will have 100 percent of the representation to which it is "entitled." If the distribution shifts to 60–40 male-female, the males have 120 percent of their entitled representation while the females have only 80 percent. In the district with 80 percent white and 20 percent black population and a wheel that is distributed 90–10 white-black, the whites have 112.5 percent of their entitled representation while the blacks have only 50 percent.

While the proportional difference is a more flexible way of considering the data, it also will present some difficulties in practical application in districts with very small minority groups. Thus, a district with 95 percent white and 5 percent nonwhite that had a wheel with a 98–2 distribution would provide white with 103 percent of entitled representation but the non-white community with only 40 percent. Very small absolute differences may result in very large proportional differences. Courts must consider, in the context of conditions prevailing in their own districts, whether the proportional differences are substantial enough to warrant attempts at corrective action. The proportional representation for wheels in your area is shown.

IV. CORRECTIVE ACTION

Wherever a court determines that the difference between the distribution of population in the community and in the master wheel is not acceptable, the court should consider corrective action that will produce an acceptable wheel. Three possibilities are available.

(1) *Substitute sources.*—If the court can identify a substitute source of names for the master wheel that can be determined to have a distribution across the relevant characteristics that adequately conforms to the distribution of the population, the court can direct that the substitute source be used instead of voter registration lists. But courts should be cautious in evaluating substitute sources. It is quite possible that a substitute source would correct an observed imbalance in the race and sex characteristics while introducing some other bias. Tax rolls, driver's license lists, and telephone lists, for example, might correct a race imbalance but might aggravate the sex imbalance and introduce an age distortion that would be unacceptable.

(2) *Supplemental sources.*—If the court can identify a source of names that might adjust an observed imbalance, it may be possible to add that source of names to voter registration lists, thus diluting the imbalance. For example, if the master wheel has an over-representation of women, and if it is known that the driver's license lists contain a greater proportion of men, the driver's license list could be added to voter lists to improve the proportions in the master wheel. Two problems require consideration in the use of supplemental lists. First, the supplemental lists also present the possibility of introducing new biases as mentioned in connection with substitute sources, though the effect of such biases would be substantially diluted when supplemental sources are combined with voter lists. Second, some method of removing duplicate names would have to be employed; otherwise the equality of opportunity for selection would be seriously distorted since a person appearing on both lists would be twice as likely to be selected as a person appearing on a single list. The feasibility of eliminating duplicates will depend upon the kinds of information associated with each name on the several lists, whether the lists are computerized, and in what form. The method is being introduced in some state systems, and the Judicial Center will try to assist any court that decides to undertake this approach.

(3) *Constructed master wheels.*—If the court decides that the voter registration list is a satisfactory source of names except for its failure to represent race and sex groups proportionately and if the court decides that the distribution in the 1970 Census is a satisfactory standard for the proper distribution of persons in the master wheel, procedures can be established to construct a master wheel that will reflect the Census distribution. Suppose the Census data reflects a 50–50 male-female distribution and the master wheel sample reflects a 60–40 distribution. It would be fairly simple to provide statistically sound procedures for constructing a master wheel with a 50–50 distribution of names drawn randomly from the voter registration lists. This method would introduce no *new* biases into the system presently used. If, however, registered female voters do not represent the female population satisfactorily, this method would intensify that dis-

tortion. If a court decides that this method would provide the needed correction, the Judicial Center will assist court personnel in its implementation.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., October 27, 1977.

Hon. DENNIS DECONCINI,
Chairman, Subcommittee on Improvement in Judicial Machinery, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR DECONCINI: I am writing in response to your request and that of Senator Wallop and Mr. Altier for certain additional information regarding the matters addressed in my testimony before your subcommittee on September 26, 1977, on S. 2072, S. 2074, and S. 2075. I am pleased to try to provide the material in which you expressed an interest.

First with respect to section 3 of S. 2075 providing statutory protection to the continued employment rights of federal jurors, I am enclosing all relevant material extracted from our files revealing incidents of employer threats or actual dismissal of jurors apparently resulting from their call to jury service. This material recounts seven separate incidents of this kind which came to the attention of the Administrative Office. I would again emphasize that this represents only a small fraction of the overall problem, since many of these situations inevitably will never be known to our office or even to the district courts in which the jurors serve. Incidentally, the newspaper articles which form the second entry in this compilation of material concern the incident in the Eastern District of Michigan which gave rise to the contempt citation by Judge Joiner referred to on page 19 of my testimony and found at 421 F. Supp. 1027.

On this point I am also enclosing the hearing record from hearings which were held in 1971 before the House Judiciary Committee on a bill regarding discharge from employment because of jury service. On pages 44 and 45 of this record are found several letters from jurors or prospective jurors recounting instances in which they were threatened with dismissal from their jobs. At one point in the hearing before your subcommittee, I referred to a conversation which I had with Chief Judge Sidney Sugarman of the Southern District of New York wherein he told me that he frequently had to intervene with jurors' employers to protect the jurors from harassment or loss of employment. You asked whether a statement could be obtained from Judge Sugarman. I am sorry to report that he passed away in 1974. Nevertheless, I am sure that the chief judges or former chief judges of many district courts, particularly in the larger metropolitan areas, have been faced with this problem and could speak thereto.

Second, with respect to six-person civil juries, the subcommittee asked for certain material respecting the juror utilization and civil caseload statistics of the fourteen district courts not having implemented a local rule reducing the size of civil juries. It should be noted that a review of our records has clarified the actual number of districts having adopted such a rule at 80, meaning that 14 district courts have no such rule and adhere to the traditional 12-person civil juries except upon the stipulation of the parties to a lesser number. I am enclosing a memorandum from James A. McCafferty, Chief of our Division of Statistical Analysis and Reports, comparing the juror utilization indexes of those districts which use six and twelve-person civil juries. We have also compiled the attached table listing statistics for the 14 districts not using the reduced civil juries.

I am also enclosing a report prepared for the Judicial Conference Committee on the Operation of the Jury System by former United States District Judge Harold R. Tyler (also recently the Deputy Attorney General) regarding the qualification for jury service of persons who have been convicted of crimes but have had their civil rights restored. This report is material to the proposed amendment to 28 U.S.C. § 1865(b) (5) which would be made by title III of S. 2074. The report has already been furnished to Mr. Altier of your staff.

Finally you ask for any observations I might make in rebuttal to the statement of Mr. Schulman, who stated that the Judicial Conference's support for the reduced size of civil juries reflects some sort of distaste for the jury system on the part of federal judges. I do not think this statement is a fair one and find no support for it whatever. On the contrary, the Judiciary Conference has consistently made clear that it is proposing a reduction in the size only of civil juries and wishes to recommend no change in the traditional 12-person criminal jury. See the 1971 Report of the Proceedings of the Judicial Conference at Page 41. The Judicial Conference has also made clear its preference for a maintenance of the traditional requirement for a unanimous verdict. See the 1973 Report of the Conference Proceedings at pages 54–55. I might add further that I have

served as secretariat for the Jury Committee of the Judicial Conference for the last 11 years and have had occasion during that time to discuss jury matters with many federal judges. To a man, they have manifested nothing but great respect for the jury system generally and for the jurors who have served in their courts.

I hope that these data and observations will be helpful to the subcommittee in its consideration of this legislation. I also wish to express our appreciation for the hearing which was afforded to us and for the excellent cooperation which we have received from Mr. Altier.

Sincerely,

CARL H. IMLAY,
General Counsel.

Enclosures.

Date: October 19, 1977.

Reply to Attn of: Mr. James McCafferty, Acting Chief, Statistical Analysis and Reports Division.

Subject: Comparison of 12 districts with civil juries of 12 members with 35 districts having local rules requiring 6 jurors for civil trials.

To: Mr. Carl Imlay, General Counsel.

At your request, we have compared 12 districts which have not yet adopted local rules permitting civil juries of less than 12 members with 35 districts which have adopted local rules specifying six jurors for civil trials. It should be noted that in both groups of districts additional jurors may be called as alternates.

We can say with confidence that the additional Juror Utilization Indexes, when averaged for the two groups of districts, are significantly different. As a group, the districts having 12-member civil juries record a significantly higher overall average JUI than the group with the reduced civil juries. (The JUI is obtained by dividing the number of jurors called to the courthouse for jury service by the number of jury trial days.)

Using the JUI as an indication of the efficient use of jurors called to the courthouse, the districts which have a local rule providing for six-member civil juries show greater efficiency than the 12-member civil jury districts.

This can be demonstrated as follows:

12 districts with 12-member civil juries:

Average JUI of the two districts with JUI lower than national JUI	(18.32)
Total trial days in 2 districts	(885)
National JUI	19.55
Average JUI if ten districts with JUI greater than national JUI	(20.65)
Total trial days in 10 districts	(2,405)
Average JUI for 12 districts	(20.02)

35 districts with 6-member civil juries:

Average JUI of 22 districts with JUI lower than national	(17.01)
Total trial days in 22 districts	(7,438)
National trial days	29,875
Average JUI of 13 districts with JUI greater than national JUI	(21.14)
Total trial days in 13 districts	(4,297)
Average JUI for 35 districts	(18.52)

The above table shows that a little more than 20 persons were called to each courthouse each day of a jury trial in districts with 12-member civil juries compared to 18 and a half persons in districts with 6-member civil juries. The number of jury trial days is helpful in showing the volume of trial activity in the districts.

The difference between the two groups is recognized, but it is not possible to clearly illustrate that the improved JUI of districts with 6-member civil juries is due to the jury size alone. Juror utilization statistics are collected for the purpose of presenting information on the overall jury utilization program and, therefore, are not designed to separate civil trial statistics from criminal trial data. There is no feasible method for discerning at the time jurors report to the courthouse for service which of these jurors will be called for a civil trial or for a criminal trial.

Civil jury trials would, if all factors were held constant, reflect better juror usage as the number of jurors required for trial is reduced. Moreover, various methods used by the courts, such as staggered trial starts, pooling of jurors, multiple voir dire and the reduction of juror calls to the courthouse can also result in improved juror utilization. Another important factor influencing juror utilization is the number of civil and criminal jury trials held by a district court.

A district with a high proportion of civil rights which practices good juror utilization procedures can have an efficient JUI. Should the 6-member jury be adopted by local rule, even when alternates are called, there is every reason to believe that when combined with good utilization practices, the lower number of civil jurors would have a positive effect on reducing the Juror Utilization Index even more.

Finally, juror utilization is affected by factors which the court can seek to control through local rules governing changes of pleas, granting of continuances and last minute settlements in civil cases.

In summary, the evidence supports the premise that the Juror Utilization Index is improved for districts with 6-member civil juries as specified by local rule. However, this improvement may be due in part to other factors including the courts' willingness to reduce the number of prospective jurors called to the courthouse without undermining the cause of justice.

The attached exhibit presents juror utilization statistics for the districts compared in this statement.

Attachment

EXHIBIT I.—*Comparsion of Juror Usage Indexes for 12 Districts With 12 Member Civil Juries and 35 Districts With 6 Member Civil Juries Year Ended June 30, 1977*

Districts with 12 member civil juries

Districts with JUI less than national average:

	JUI
Texas, N	18.24
Ohio, S	18.50
National average	19.55

Districts with JUI greater than national average:

Michigan, E	**19.65**
Georgia, M	19.99
Georgia, S	20.27
North Dakota	20.49
Arkansas, E	20.91
Canal Zone	21.43
New York, W	21.60
Mississippi, S	22.82
Arkansas, W	23.39
North Carolina, E	24.61

Districts with 6 member civil juries

Districts with JUI less than national average:

	JUI
Wyoming	12.24
Oklahoma, E	14.69
Nebraska	15.43
Rhode Island	15.58
Louisiana, E	15.66
Wisconsin, E	15.81
Alabama, S	15.95
Oregon	16.02
Massachusetts	16.07
North Carolina, M	16.62
California, N	16.77
Colorado	16.77
Kansas	16.87
Alabama, N	17.30
Illinois, N	17.47
New Mexico	17.55
Minnesota	17.62
Alabama, M	17.73
New Hampshire	18.10
Illinois, E	18.38
Virginia, E	18.45
New Jersey	18.87
National average	19.55

Districts with JUI greater than national average:

Pennsylvania, W	19.63
California, C	19.77
Ohio, N	20.43
Illinois, S	20.89
Arizona	21.56
Connecticut	21.59
Kentucky, W	21.91
California, E	22.48
California, S	22.73
Missouri, W	22.85
Texas, W	23.67
Maine	24.03
Louisiana, M	26.59

Prepared by: Statistical Analysis and Reports Division, Administrative Office, U.S. Courts.

COURTS NOT USING 6-PERSON JURIES (FOR THE 12-MO PERIOD ENDING JUNE 30, 1977)

	1977 JUI[1]	Rank[2] (JUI)	Pending civil cases	Rank[3] (pending civil cases)	Median disposition[4] (time in months)
New York, western	21.60	71	1,167	46	10
North Carolina, eastern	24.61	90	842	53	10
Virginia, western	15.37	6	1,094	49	7
Georgia, middle	19.99	57	493	78	6
Georgia, southern	20.27	58	804	58	9
Mississippi, southern	22.82	77	1,133	48	8
Texas, northern	18.24	40	2,850	16	12
Canal Zone	21.43	66	520	74	7
Michigan, eastern	19.65	50	3,924	8	11
Ohio, southern	18.50	43	1,988	22	7
Arkansas, eastern	20.91	63	1,607	31	14
Arkansas, weste.n	23.39	83	779	61	15
North Dakota	20.49	61	228	93	8
Utah	23.40	84	580	70	9

[1] Juror usage index equals total available jurors divided by total number of jury trial days.
[2] Rank from lowest to highest.
[3] Ranked from highest to lowest.
[4] Median time from filing to disposition. Excludes land condemnation, prisoner petitions, and deportation reviews.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK,
Brooklyn, N.Y., October 4, 1977.

WILLIAM R. BURCHILL, ESQ., *Associate General Counsel, Administrative Office, U.S. Courts, Washington, D.C.*

DEAR MR. BURCHILL: In connection with your request for information as to cases in which disputes have arisen with employers concerning the discharge of employees who served as jurors, I enclose herewith copy of a letter, dated October 3, 1977, from Edward S. Rudofsky, Assistant U.S. Attorney, setting forth the details of such a case involving the discharge of a juror, Mrs. ——— ———.

I hope this gives you the information you desire.

Very truly yours,

LEWIS ORGEL,
Clerk of Court.

Enclosure.

October 3, 1977.

Re: Unlawful harassment/discharge of juror.

HON. LEWIS ORGEL,
Clerk, U.S. District Court, Eastern District of New York, Brooklyn, N.Y.

DEAR MR. ORGEL: Pursuant to Judge Dooling's request and our conversation of September 29, 1977, we herewith summarize the facts and circumstances disclosed by our investigation into the firing of ——— ——— following her service as a petit juror in this district.

During the week of March 6, 1976 ——— ——— was summoned to serve as a juror beginning March 29th. On March 10th her employer ——— ———, President of ——— ———, a New York City consulting firm, wrote to the Court, requesting that ——— ——— be excused from jury duty because the only coworker who could cover her duties would be on vacation during the first two weeks of April, 1976. On March 27, 1976 ——— ——— was advised by the jury clerk that she had not been excused from jury duty and was to report, as scheduled on the 29th.

On the 29th ——— ——— was selected as a juror in the case of *United States* v. *Rosenbaum*, which was tried before Judge Dooling. She promptly advised ——— of her selection and he, in turn, called Judge Dooling's chambers to again attempt to have ——— ——— excused. By letter dated March 30, 1976 Judge Dooling advised ——— ——— that ——— ——— had attempted to be excused, but that the excuse presented was legally insufficient and that she would accordingly be required to serve.

——— ——— served as a juror until April 14, 1976. During this period her husband ——— ———, was advised by the ——— ——— bookkeeper that, in accordance with company policy, ——— ——— would receive her regular salary for the period she was on jury duty, but would be required to endorse her jury duty pay check to the order of ——— ——— whenever she was paid by the government. Also during this period ——— ——— telephoned Judge Dooling's chambers at least once to ascertain when ——— ——— would be able to return to work.

Upon her return to work on April 15th, a payday, ——— ——— was told by ——— ——— that ——— ——— would only pay her for the net differential between her regular salary and her government pay as a juror, and that she would have to wait for the latter (some $273, less deductions) until the government check was issued some weeks later. When ——— ——— questioned this on the basis of the information given to her husband, ——— ——— stated that he did not believe that ——— ——— had seriously attempted to be excused from jury duty and that he was dissatifised with her failure to show any interest in the firm's business during the period she was on jury duty, as evidenced (in his view) by her failure to call him during lunch breaks or in the evenings.

——— ——— was thereupon fired and was subsequently unemployed for 11 days.

——— ——— lodged a complaint with Judge Dooling, who referred the matter to this Office. Investigation by a Special Agent of the Federal Bureau of Investigation thereafter confirmed ——— ——— allegation that ——— ——— had lied in his March 10th letter to the Court inasmuch as the co-worker in question was not scheduled to take a vacation during the period in question. Furthermore, the FBI investigation established that ——— ——— had a satisfactory, though not outstanding, work record at ——— ——— and that there was not reason to believe that she would have been fired if she had not been called to serve as a juror.

At this point we determined that there was reason to believe that the employer's actions in this matter violated 18 U.S.C. § 1503, which prohibits, inter alia, injury to the person or property of a juror on account of her official duties, and that the March 10th letter to the Court may have also constituted a false statement in violation of § 1001 as well as a contempt punishable under 18 U.S.C. § 401(3). ——— ——— was then interviewed by the undersigned in the presence of his attorney and was advised of the nature of the charges against him and the seriousness with which we viewed the offense.

After this meeting and a series of telephone discussions between counsel, ——— ——— agreed to reimburse ——— ——— for the saalry lost while she was unemployed, $206.18 (after taxes), and wrote a formal letter to Judge Dooling apologizing for the appearance of impropriety in the termination of ——— ——— employment and assuring the court that future ——— ——— communications on the subject of jury duty would be as accurate as possible.

——— ——— was completely satisfied with this result and we did not believe that prosecution was called for under the circumstances, especially in light of the fact that this was apparently, a "first offense" on the part of the employer. Accordingly, the case was closed.

Our office did, however, issue a press release cautioning all employers against pressuring or otherwise restricting the ability of their employees to serve as jurors, and warning employers that making false statements to the Court, or demanding that employees attend private business while on jury duty, or firing an employee because of jury service, are all illegal. A brief news report, based on this press release, was published in the New York Times of October 20, 1976, at p. 49.

Very truly yours,

DAVID G. TRAGER,
U.S. Attorney.

By: EDWARD S. RUDOFSKY,
Assistant U.S. Attorney,
Deputy Chief, Civil Division.

[From the Detroit News, November 5, 1976]

AMC, Official Fined in Juror Firing Threat

(By Robert Ankeny)

An ——— ——— sale executive—and the corporation—both have been cited for contempt in Federal Court because the executive threatened to discharge an employee who had been called for jury duty.

Federal Judge Charles W. Joiner yesterday fined the company and the supervisor, ——— ——— $100 each for contempt of court.

The judge made the landmark decision even though noting that the threat to fire the employee was not carried out. Joiner also noted that ——— ——— has a policy encouraging jury service. But he said he considered these facts only in weighing what punishment to impose.

Joiner wrote in his ruling: "Jury service is a duty of all. If the system is to work effectively, service on a jury must be accepted by all. Threats to get jurors not to accept this responsibility are contemptuous."

The decision came after Joiner took testimony during a two-day hearing last month.

——— ——— sales executive ——— ———, who works for ——— ——— in the firm's international sales division, was called for Federal Court jury duty last August and was chosen to serve on a jury in Judge Joiner's court.

While ——— ——— was serving on the jury, ——— ——— discovered he needed some pricing data redone. According to the judge's findings, ——— ——— then directed ——— ——— to get the names of persons who could excuse him from jury service.

"If I don't have the names on my desk before tomorrow morning, you don't have to worry about coming back to work," was what ——— ——— said, in effect, according to the judge.

——— ——— gave ——— ——— the names of two court jury clerks and then reported for jury duty Aug. 17.

——— ——— called the clerks, Jeanne Burge and Joe Pulis, and was told ——— ——— was serving on a case and could not be excused.

Burger said ——— ——— told her, "He (——— ———) might not have a job to come back to."

Pulis testified that ——— ——— told him, "——— ——— job was on the line if he were not released from jury duty."

——— ——— testified he did not intend to "obstruct the administration of justice" when he made the satements. He said that, when the clerks told him, ——— ——— would be serving no longer than a week, he responded, "I can live with that." ——— ——— completed his jury service and was not fired.

[From Free Press, November 1976]

AMC, Supervisor Fined for Threat To Worker on Jury

(By Susan Morse, Free Press Staff Writer)

American Motors Corp. and an AMC sales supervisor were both ruled in contempt of court Thursday for threatening to fire an employe if he didn't come back from jury duty.

The company and the supervisor, ——— ———, were fined $100 each.

U.S. District Judge Charles Joiner criticized their behavior in his decision on the contempt, saying that a juror cannot concentrate properly on a case before him if he is worried about the security of his job.

The contempt findings stemmed from the jury service of ——— ———, a management level employe in AMC's international sales division office in Southfield.

——— ——— was called as a federal court juror for the month of August and was chosen for a jury in a welfare fraud case that began Aug. 16.

According to Judge Joiner's synopsis of the case, ——— ——— was telephoned that day by ——— ———, his immediate superior, and told that he was needed at work.

——— ——— said ——— ——— told him that unless ——— ——— had the names of persons who could excuse him from jury services on ——— ——— desk before morning, "you don't have to worry about coming back to work."

Two jury clerks also testified that ——— ——— telephoned there and threatened that ——— ——— would lose his job if he were not released from jury duty. ——— ——— was not released.

——— ——— later said he did not mean his statements as threat to ——— ——— job and "did not attempt to obstruct the administration of justice."

But the court ruled against both ——— ——— and ——— ———, reasoning that ——— ——— represented the company in his conversation with ——— ——— and that he told the jury clerks he represented AMC.

A company spokesman said Thursday that AMC viewed the contempt citation against the firm as "erroneous" but has not yet decided whether to appeal.

U. S. District Court,
Eastern District of Pennsylvania,
Philadelphia, Pa., March 5, 1975.

William R. Burchill, Esq.,
General Attorney, Administrative Office of the U.S. Courts, Supreme Court Building, Washington, D.C.

Dear Mr. Burchill: Mr. Kunz, our jury clerk, told me that he has spoken to you about the enclosed letter. I need not tell you how serious a matter it would be from a standpoint of jury functioning if there is substance to ——— ——— complaint. I would therefore request that you forward this to the appropriate division of the Attorney General's office for prompt and vigorous investigation.

I appreciate your cooperation.

Sincerely yours,

Joseph S. Lord, III,
Chief Judge.

April 7, 1975.

J. Stanley Pottinger, Esq.,
Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C.

Dear Mr. Pottinger: Mr. Steven I. Ginsberg of my Office has been in contact this date with Mr. Walter Barnett of your Division, regarding a problem which arose in the Eastern District of Pennsylvania relating to the jury service of Mrs. ——— ———. Mr. Barnett stated that your Division would be interested in attempting to find a solution to this problem.

——— ——— recently completed Federal jury service in the Eastern District of Pennsylvania (January 6, 1975–January 20, 1975). After she returned to her place of employment, ——— ———, with which she had been for eight years, she was fired for no other apparent reason than having served jury duty. We have attached a copy of the letter which she sent to Mr. Michael Kunz, Deputy Clerk for the Eastern District of Pennsylvania, wherein she stated that she had only 15 months until her retirement benefits would vest.

After receiving these papers from Mr. Kunz and after contacts with Chief Judge Joseph S. Lord, III of the Eastern District of Pennsylvania, we transmitted this information to Senator Richard S. Schweiker of the Committee on Labor and Public Welfare for his consideration because of his well-known interest in the integrity of the jury system. In fact, in the last session of Congress a bill providing for the protection of Federal jurors' employment rights, which he introduced and sponsored, was passed by the Senate as an amendment to S. 3265. Senator Schweiker was so keenly interested in ——— ——— plight that he personally wrote her former employer, ——— ———. I have enclosed a copy of Senator Schweiker's letter to ——— ——— and his letter to our Office transmitting their reply.

Although there seems to be some gap in the law on this subject, evidenced by the pendency on the 92nd Congress of H.R. 10689, and the 93rd Congress of H.R. 10897 and S. 3265, as passed by the Senate, and in the 94th Congress of S. 539 (Senator Schweiker's proposal), we are writing you to enlist whatever aid you

might give us in helping not only the integrity of the jury system but also ——— ———. The problem is a recurring one and without the passage of legislation for this length of time, possible alternatives for solving these problems, including litigation by the Department of Justice, need to be explored.

I would appreciate your expeditious study of this problem.

Sincerely,

CARL H. IMLAY,
General Counsel.

Attachments.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 12, 1975.

MR. CARL H. IMLAY,
General Counsel, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. IMLAY: This is in response to your correspondence of April 7, 1975, concerning the dismissal of ——— ——— from her employment with ——— ——— allegedly because of her service as a juror in the United States District Court for the Eastern District of Pennsylvania.

We have directed the Federal Bureau of Investigation to investigate this matter. Upon receipt of the investigative reports, we will take whatever action is warranted.

Sincerely,

J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

U.S. SENATE,
COMMITTEE ON PUBLIC WELFARE,
Washington, D.C., March 14, 1975.

President. ——— ———.
Chicago, Ill.

DEAR ——— ———. I have become deeply concerned over an incident involving an employee of the ——— ——— office at 300 East Ontario Street, Philadelphia, ——— ———, and am writing to ask for further information.

She has complained that she was dismissed as a result of serving on federal jury duty for a period of two weeks and one day in January this year.

The Administrative Office of the U.S. Courts in Washington, has been in touch with me on this matter. That office shares my deep concern over any adverse impact that jury service could have on the employment rights of American citizens, whether it be in connection with federal, state, or local jury duty. The right to a trial by jury is a basic Constitutional duty which can be effectively thwarted if men and women serving temporarily on juries are threatened with job separation because of the time they serve on juries.

I am particularly concerned with the situation arising where an employee is dismissed because of jury duty, but where some other reason is offered up by the employer. This kind of subterfuge is just as damaging to the jury system as outright firing because of time necessarily spent away from the job.

Late last year, the Senate passed an amendment I introduced to guarantee job protection for citizens serving on juries. Enclosed, for your review, are statements on that legislation. Unfortunately the House was unable to complete action on the proposal by the end of the 93rd Congress. I am currently preparing to reintroduce the measure this year.

Enclosed, for your review, is a copy of ——— ——— complaint to the courts. I am interested in the circumstances of ——— ——— case in connection with my legislation, and would appreciate a prompt response to my request for further information.

Sincerely,

RICHARD S. SCHWEIKER,
U.S. Senator.

——— ———.

Chicago, Ill., March 25, 1975.

HON. RICHARD S. SCHWEIKER,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR SCHWEIKER: I apreciate your concern over ——— ——— complaint that she was dismissed as an employee of ——— ——— because of her serving as a Federal juror during January 1975; and I am pleased to have the opportunity to respond to your inquiry.

I agree with your statement that, "the right to a trial by jury is a basic constitutional duty which can be effectively thwarted if men and women serving temporarily on juries are threatened with job separation because of the time they serve on juries." As indicated in your letter, I am sure that your close association with such matters has revealed instances where an employer has offered up other reasons for termination of an employee when possibly the real reason was because of the employee's absence from work because of jury service. This is not true in ——— ——— case; nor am I aware of any other termination of an employee of ——— ——— because of jury service.

Further, ——— ——— neither terminates nor threatens employees with termination because of jury service. In fact, seven employees, one of whom is my secretary, served as juror without fear of recrimination or job termination during the calendar year 1974. I am aware of two instances where jury service by an employee would have unduly interrupted the normal business function and the company retained counsel to assist the employee in being properly excused. Our policy is to encourage those excused employees to serve as jurors at a later time.

So that you may better understand the company's policy toward employee jury service, the company, since its formation, has had a policy to place those employees serving as jurors on paid leave of absence less any jury fees they should receive. In order not to cause undue hardship on those employees, the deduction is timed to coincide with the week in which the employee actually receives his jury fee, rather than the weeks during which he serves. Until your letter, I was not aware that many employees of other companies who serve as jurors suffer loss of employment for such service. In an effort to absolutely assure that no employee of ——— ——— will suffer loss of employment for jury service, I have directed the Personnel Department to reissue and circulate the company's Jury Policy so that its managers and employees clearly understand it.

It is indeed unfortunate that ——— ——— termination was so close in time to her jury service that it could possibly give rise to the inference that her jury service was the actual reason for termination. The company feels that there were adequate and justifiable reasons for her termination, none of which included her absence from work because of jury service.

Because of the corporation's policy and attitude toward employee jury service as outlined above, I know that you will agree with me that ——— ——— complaint is unwarranted and not true.

The corporation will continue to encourage its employees to be active, well informed citizens who participate in government and will remind them that they can fulfill their commitment "to government by the people" without fear of loss of employment.

Sincerely yours,

——— ———.

U. S. SENATE.
COMMITTEE ON LABOR AND PUBLIC WELFARE.
Washington, D.C., April 3, 1975.

STEVE GINSBERG, ESQ.,
Office of the General Counsel, Administrative Office of the United States Courts,
Supreme Court Building, Washington, D.C.

DEAR MR. GINSBERG: I am enclosing a copy of the reply received from ——— ——— President of ——— ——— regarding the company's firing of an employee who served as a federal juror.

Please note that ——— ——— reports that the ——— ——— has a jury policy which does not interfere with the judicial process and which does not in any way penalize employees called as jurors. He stated that ——— ———

was not fired because of her jury duty. He offers no explanation of the reason why she was fired.

Since Judge Lord has asked that the Attorney General's office make a final investigation of this matter, I am transmitting ——— ——— letter to you with a request that you send it to the appropriate Justice Department personnel charged with this investigation. It seems to me that there is a very strong need for the Court and for me to have quickly the benefits of whatever factual light can be shed on the circumstances of ——— ——— dismissal.

I know that Judge Lord shares my very deep concern in this matter and I am, therefore, sending him a copy of this letter and a copy of ——— ——— report. I would like very much to get to the bottom of this and hope you will keep me as fully informed as you properly can.

Sincerely,

RICHARD S. SCHWEIKER,
U.S. Senator.

MAPLE SHADE, N.J., *March 25, 1976.*

DEAR MR. LEVI: I would appreciate any help that you could offer concerning the problem that has plagued me since February 1975, when I was fired from ——— ——— because I was unable to get excused from jury duty with the U.S. district court, Philadelphia.

Enclosed you will find a copy of the letter sent to Mr. Kunz, district court clerk. To explain the terrible thing that happened to me.

Since that time Agent Logan with the F.B.I., Philadelphia has investigated the case, and Mr. Kunz of the U.S. District Court in Philadelphia has been trying to keep me advised, but has not been able to learn anything about the case. He can only advise me that "They are still working on the matter". Mr. Logan said, "I only report the facts to Washington".

I have been unable to determine to whom the facts have been reported or, what action has been taken, if any.

As a matter of information, The Division of ——— ——— in Philadelphia, where I was employed, has been sold to a local Rendering Co., last July.

I trust that the enclosed letter, plus other information obtained by your agents will allow someone to reach a prompt decision concerning my case.

One year ago I was advised against going to the various civil liberty groups, to help fight this terrible injustice, until the Government could investigate the case, and take proper action to protect people like myself.

As of his writing I am doubtful if I made the correct decision. I am the only one who has lost everything, by serving my country. No one seems concerned.

I would appreciate a prompt reply to this letter in order that I may determine my next course of action, if any, against those involved in this unjust situation. I feel that what happened to me is in direct violation of our governmental process. Why some people are allowed to make a mockery of it, while those who try to better the system get hurt, is an unfortunate condition of our country today.

Thank you for your attention and cooperation concerning the above.

Sincerely yours,

——— ———.

FEBRUARY 14, 1975.

DEAR MR. KUNZ: It is with deep regret that I am writing this letter of complaint.

I served as juror in the Federal Court during the weeks of January 6, Jan. 13 and the day of January 20.

I informed my office manager ——— ———, and presented her with my summons several weeks before January 6, 1975, and advised her to obtain a replacement for my position, as a telephone operator plus other duties.

I was told that I should try to be excused and that no action was necessary at that time. ——— ———, the assistant controller of ——— ———, Meat By-Products Division, Prudential Plaza Building, Chicago, Illinois, suite 2300, who is ——— ——— superior advised ——— ——— that a replacement was necessary Friday, Jan. 3, 1975, and I was told to call Bell-Telephone to obtain a replacement operator.

During my two weeks and one day of Jury service I did not call my office, because they were well aware that I was performing my duties as a juror. I did call on Friday, Jan. 17, 1975, to advise ——— ——— that my time was extended by one day, (Jan. 20, 1975) but there was no answer, since the office was closed early due to adverse weather conditions. I did inform my co-worker ——— ——— on the week-end to tell ——— ——— that I would still be on jury duty, Monday, Jan. 20, 1975 & that I would be in work, Tuesday, Jan. 21, 1975.

Upon returning to ——— ———, 3000 East Ontario St., Phila., Penn. 19134. The atmosphere and attitude of ——— ——— was very strange and distant, from the complete opposite, only two weeks previous.

After nine years of extremely dedicated service and receiving numerous compliments concerning my performance as an operator up until the time I served as juror.

I was "fired" two weeks & four days later after returning from jury duty, without any previous warning or indication that my superiors were unhappy with my work duties.

The excuses given for my dismissal were:

1. "You did not consider me ——— ——— as your superior"—which is definitely not true.

2. ——— ——— is holding a grudge against you since last October. Explanation: My brother was critically injured and was unconscious for three weeks. I took four days off and was paid for three days. I questioned the reason for not paying me for the fourth day, since I had performed many extra duties, without compensation, and very seldom took any sick days thru the year. I felt that I was entitled to the one day's pay. Apparently this request did not meet with ——— ——— approval.

3. "You Did Not Call In When You Served on Jury Duty." ——— ——— told me that I would have to try for unemployment on my own, she will not try to help me.

I feel that I was unjustly Fired and that the reasons given are false & unfair & that the primary reason is because I was unable to get excused from jury duty, & this created an additional expense for the company by having to hire a replacement.

I stand to lose a great deal in Retirement Benefits, with only 15 months more service to acquire vested rights, my hospitalization, long term disability insurance, & my weekly salary for I am the sole supporter of my husband & my three children. My husband has been out of work since May of 1974. Plus the degrading of my character by being "Fired," for the first time in my 21 years in the business world.

Mr. Kunz if you are going to send copies of this letter to the company, please send special copies to: ——— ———, president; ——— ———, vice president; ——— ———, controller.

The address is: ——— ———, Prudential Plaza, Chicago, Ill.

These executives of the company have the right to know what their management people are doing to the employees in Philadelphia. ——— ——— is with the company 3 months and ——— ——— is employed 10 months.

This tragic incident must be recognized and known, because if ——— ——— and ——— ——— can do this unjust cause to me, what protection do the rest of the employees of ——— ——— in Phila. have???

I failed to mention that I was fired Friday, Feb. 7, 1975, at 4 p.m.

I was in such a state of shock that I refused to believe that this happened to me. I didn't leave my position at the switchboard until 5:15, the normal time of closing the board.

——— ——— did not bother to get a relief girl to fill in the ending of the day.

I regarded my job not only as duties to be performed & to receive pay for at the end of the week. But the compassion & feelings that I felt for our office force & the people I got to know thru the switchboard.

Thank you for your prompt attention & cooperation concerning the above.

Yours truly, & Heart Broken.

——— ———.

Mr. KUNZ: If you would want additional information my address is: ———— ————, 2852 Almond St., Phila., Penn. 19134.

Thanks once again!!

DEPARTMENT OF JUSTICE,
Washington, D.C., November 17, 1975.

CARL H. IMLAY,
General Counsel, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. IMLAY: In our letter to you of May 12, 1975, we indicated that we had directed the Federal Bureau of Investigation to investigate the complaint of ———— ———— that she was dismissed from her job with the ———— in Philadelphia because of her service as a juror in the United States District Court for the Eastern District of Pennsylvania.

The investigation of this matter was delayed for several reasons. At first there were negotiations concerning certain restrictions which the ———— ———— wanted to place upon the use of any information is provided the FBI. In addition, the General Counsel of ———— ———— was engaged in a major legal project in June and July of 1975, and several witnesses, including the company president, were on vacation when the investigation was to commence.

The Federal Bureau of Investigation has now completed its investigation, and we have studied the investigative reports. We have concluded that the evidence does not support ———— ———— contention that she was dismissed from her job because of her service as a federal juror. Rather, the information we received during the investigation supports ———— ———— contention that there were reasons for ———— ———— dismissal which were completely unrelated to her jury service. Accordingly, further action by this Department is unwarranted.

Thank you for bringing this matter to our attention. We will be happy to consider any similar complaints which you may receive in the future.

Sincerely,

J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

APRIL 7, 1976.

———— ————

Maple Shade, N.J.

DEAR ———— ————: Your letter of March 25, 1976, to Attorney General Levi has been referred to this office by the Department of Justice.

Upon being notified last year by the United States District Court for the Eastern District of Pennsylvania of your dismissal from employment at the ———— ———— upon the completion of your jury service in the court, the Administrative Office contracted the Civil Rights Division of the Department of Justice on this matter. We asked them to explore the circumstances surrounding your dismissal and to determine whether any violation of Federal law had occurred such that the Department could bring action to redress the situation under the civil rights statutes.

On November 17, 1975 this office received the attached letter from the Assistant Attorney General informing us of the outcome of an F.B.I. investigation into this matter. The Department concluded that, because the circumstances surrounding your dismissal were somewhat unclear and ambiguous, it was not in a position to further pursue any legal remedies in this situation.

I wish to assure you that the Administrative Office of the United States Courts and the United States District Court are most concerned about any harassment or retaliation by employers or others against persons performing jury service in the Federal courts. In view of the attitude of the Department of Justice as expressed in their enclosed letter, however, there is no further action which this office or the district court can take with respect to your complaint. I can only advise you to explore whatever legal remedies may be available to you directly to redress what you believe to be an unjustified dismissal by your former employer. In this connection, you may wish to consult an attorney to

consider any sources of legal redress which may be available. You may be interested in the attached opinion of the State Supreme Court of Oregon on a case which is somewhat similar to your own. The citation for this opinion is *Nees v. Hocks*, 536 p. 2d. 512 (S.C. Or. 1975).

Please contact me if there is any further information which I can provide.

Sincerely,

WILLIAM R. BURCHILL, JR.,
Associate General Counsel.

Enclosure.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF INDIANA,
Indianapolis, Ind., March 22, 1974.

MR. CARL H. IMLAY,
General Counsel, Administrative Office of the U.S. Courts, Supreme Court Building, Washington, D.C.

DEAR CARL: Herewith you will find a copy of a letter under date of March 20, 1974, from Judge Holder which was accompanied by a copy of the letter under date of March 17, 1974, from ——— ——— a petit juror in Judge Holder's Court. Judge Holder's and ——— ——— letters are self-explanatory.

I thought you might wish to add these letters to your material in support of the proposed legislation to make it an offense for an employer to penalize an employee for being away from his employment while performing jury duty.

With kindest personal regards, I remain

Cordially,

WILLIAM E. STECKLER,
U.S. District Judge.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF INDIANA,
Indianapolis, Ind., March 20, 1974.

HON. STANLEY B. MILLER,
U.S. District Attorney,
246 Federal Building,
Indianapolis, Ind.

DEAR SIR: Attached hereto is a copy of a letter dated March 17, 1974 from ——— ——— which is self-explanatory. ——— ——— is on the current jury panel. He is aware that his letter is being forwarded for action to the United States Attorney. Mr. Smith, the Room Clerk, is directed not to seat this juror in criminal cases.

Heretofore, I wrote you about another juror whose employer had allegedly penalized him because of his jury service.

Please consider this a new case.

Very truly yours,

CALE J. HOLDER.

Enclosure.

INDIANAPOLIS, IND., *March 17, 1974.*

DEAR SIRS: I am writing this letter in an attempt to explain the circumstances surrounding my dismissal from ——— ———, 3304 Madison Ave., Indianapolis, Indiana.

On Monday, February 11, 1974, I was selected to appear for jury duty in Federal Court for as many days as required to complete the trial.

My boss and manager of the aforementioned business concern was aware of the fact that I was appearing on Monday mornings for consideration as a prospective juror. I presented a photostatic copy of my jury summons and affidavits of jury appearances since January 2, 1974.

When selected as a juror I did not call in to my place of employment to inform them of my jury duty. I took it for granted that ——— ——— knew of my whereabouts because of my previous appearances for jury duty.

I called ——— ——— on Thursday, February 14, 1974 to inform him that I would be returning to work the following day, Friday. I was told by ——— ——— to bring in my uniforms and that I was no longer employed by ———. The reason given me was my negligence in calling them to let them know where I was.

To the best of my knowledge, the previously mentioned circumstances led to my dismissal from my full time job.

Sincerely,

———— ————.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA,
Pittsburgh, Pa., December 8, 1976.

Re ———— ————

WILLIAM R. BURCHILL,
General Attorney, Legal Advice and Interpretation Division, Administrative Offices of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. BURCHILL: During the week of November 8, 1976, I phoned both Mr. Imlay and yourself regarding a juror who reported that he had been dismissed from his job due to his serving on jury duty in the United States District Court for the Western District of Pennsylvania. Chief Judge Herbert P. Sorg also telephone Mr. Imlay regarding this incident at that time.

His attorney, Mr. Robert Truel, contacted our office regarding this dismissal. As you advised on the phone at that time, I suggested that he have the juror outline the facts of the dismissal, have it notarized, and forward it to us and I will then transmit it to you for possible referral to the Civil Rights Division.

I am enclosing the affidavit of the juror and the accompanying letter from his attorney.

————— ————, was summoned for jury duty for the two week jury panel commencing September 27, 1976. His actual days of service were September 29th, October 5th, October 6th, October 7th and October 8, 1976 when he was discharged from jury service.

If there is any additional information needed regarding this matter please contact me.

Sincerely,

GILBERT W. CONLEY,
Chief Deputy Clerk.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., December 21, 1976.

Hon. J. STANLEY POTTINGER,
Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C.

DEAR MR. POTTINGER: Periodically this Office receives reports from the United States district courts that persons summoned for Federal jury service pursuant to the Jury Selection and Service Act of 1968, as amended, (28 U.S.C. § 1861, *et seq.*) are being improperly coerced and threatened with dismissal from employment, or on occasion have actually had their employment terminated, solely on account of being summoned for jury duty. This sort of action by an employer is in contravention of § 1861, Title 28, which provides that every citizen shall have the opportunity to be considered for jury service and shall have the obligation to perform such service when summoned for that purpose. Additionally, such threatening or coercive action by employers may be a violation of other civil rights provisions with respect to the coerced employer/juror.

Concerned as we are about the implications of such employer treatment with respect to the rights of affected individuals themselves, we are even more concerned about the effect of such actions on the jury selection and jury composition in the district courts. As you know, it is provided by Section 1861 that all litigants in Federal courts shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is not unusual that an employee who is under duress by his employer to avoid jury service in order to preserve his job will involuntarily seek to be excused from service. Such occurrences are not only an interference with the right of such persons to serve on Federal juries, but they also pose a threat to the cross sectionality of the resulting jury panels.

In the past your office has been most cooperative in investigating instances of alleged juror intimidation by an employer with respect to the threatened termination of employment on some pretextual ground, where the actual threat is directly linked to a summons for jury service. For instance, on April 7, 1975 I

wrote to you asking that you investigate the dismissal of ——— ——— from the ——— ——— following her service on a jury in the United States District Court for the Eastern District of Pennsylvania. You informed us by letter of May 12, 1975 that such an investigation had been undertaken and subsequently conveyed to us the results by letter of November 17, 1975.

At this time another such instance of dismissal of a juror has been reported, as indicated in the attached correspondence from the United States District Court for the Western District of Pennsylvania to my Associate General Counsel, William R. Burchill. The correspondence transmitted to us an affidavit from ——— ——— indicating that he was dismissed by his employer following his service on a jury in that court. I would very much appreciate your asking the Federal Bureau of Investigation to look into the circumstances surrounding this situation. Following their investigation I would appreciate any action which your Division may see fit to take on the basis thereof to redress ——— ——— rights.

Thank you very much for your assistance in this matter, and please advise me if there is any further information which you require at this time.

Sincerely,

CARL H. IMLAY,
General Counsel.

TRUEL & PLOEGER,
Pittsburgh, Pa., December 7, 1976.

Re ——— ———

Mr. GILBERT W. CONLEY,
Chief Deputy, United States District Court, Office of the Clerk, Western District of Pennsylvania, Pittsburgh, Pa.

DEAR MR. CONLEY: As per your letter of November 12, 1976, enclosed you will find the facts as verified by ——— ———. We would ask that you please take the appropriate steps to protect ——— ——— rights in this matter.

Very truly yours,

ROBERT B. TRUEL.

Enclosure.

I, ——— ———, hereby declare the following to be the facts as relates to my dismissal from my employment.

I started to work for ——— ———, Incorporated, whose home office is ——— ——— ———, Norristown, Pennsylvania 19407. My employment was at the ——— ——— located at ——— ——— ——— ———, ———, Pennsylvania on May 10, 1976. I was employed as an attendant working part-time averaging between twenty (20) to thirty (30) hours per week. On or about September 15, 1976 I received notice of my appointment as a juror for the Federal Court for the Western District of Pennsylvania. I then notified my immediate superior, ——— ———. ——— ——— told me not to go but to ask for a hardship as he said that this is what he always did. I advised him that in good conscience I could not do this. He, therefore, told me that if I did go to jury duty, I would be dismissed from my job. I showed him the notice and he insisted that if I was absent from work during this time, I would be terminated. I fulfilled my obligation as a juror and was advised that I was terminated.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
County of Allegheny, ss:

Before me, the undersigned authority, personally appeared ——— ———, who, being duly sworn according to law, deposes and says that the averments contained in the enclosed are true and correct to the best of his knowledge, information and belief.

——— ———.

Sworn to and subscribed before me this 6th day of December, 1976.

LILLIAN D. SIMONE,
Notary Public.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., January 10, 1977.

Re: ——— ———

CARL H. IMLAY,
General Counsel, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. IMLAY: This is in response to your letter of December 21, 1976, concerning the dismisal of ——— ———, from his employment with ——— ——— ——— ———, Incorporated, of Norristown, Pennsylvania, following his service as a juror in the United States District Court for the Western District of Pennsylvania.

I have asked the Federal Bureau of Investigation to conduct an inquiry into the circumstances of ——— ——— dismissal. I will advise you of our findings when the inquiry is completed.

Thank you for bringing this matter to my attention.

Sincerely,

J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

TRUEL & PLOEGER, PITTSBURGH, PA.,
December 23, 1976.

Re: ——— ———

MR. GILBERT W. CONLEY,
Chief Deputy, U.S. District Court, Office of the Clerk, Western District of Pennsylvania, Pittsburgh, Pa.

DEAR MR. CONLEY: On December 23, 1976, I attended an Unemployment Compensation hearing on behalf of ——— ———. As you will recall, I had previously forwarded information to you by way of an Affidavit of ——— ——— that indicated that he had been fired from his job because of his jury duty in Federal Court.

As it developed in the Unemployment Compensation hearing, I am certain that he was not fired but did, in fact, quit. This is the first time that this information came to my knowledge and, therefore, I wish to transmit it to you and advise you that I think that the matter which I had previously forwarded should be dismissed as there is no basis in fact.

I might point out that there was nothing malicious or false perpetrated by ——— ——— as he was merely mixed up in his understanding of the facts as this became clear at the hearing.

If there is anything further that you desire from my office, please advise.

Very truly yours,

ROBERT B. TRUEL.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA,
Pittsburgh, Pa., January 4, 1977.

Re: ——— ———

WILLIAM BURCHILL,
General Attorney, Legal Division, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR SIR: My previous letter of December 8, 1976, contained an affidavit and the problems of the above-named juror. His attorney requested that our office act on the juror's dismissal.

I then received a copy of a letter from Mr. Imlay addressed to J. Stanley Pottinger of the Civil Rights Division of the Department of Justice in which he requests an investigation of the matter.

Apparently an investigation is unwarranted as the enclosed letter from Attorney Truel explains since the matter has been resolved.

I am sorry your office has been put to the unnecessary steps of processing this complaint. However, it can now be dismissed on the basis of the enclosed copy of Attorney Truel's letter.

Thank you for your prompt cooperation in this matter.

Sincerely,

GILBERT W. CONLEY,
Chief Deputy Clerk.

JANUARY 11, 1977.

Hon. J. STANLEY POTTINGER,
Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C.

Attention: Kathy McGinniss.

DEAR MR. POTTINGER: I refer to my correspondence of December 21, 1976, regarding a complaint by ——— ———, a juror in the United States District Court for the Western District of Pennsylvania, that he had been dismissed from his employment on account of his performance of jury service. I asked that you investigate the circumstances surrounding this occurrence.

I have since received from the Chief Deputy Clerk of that court the attached correspondence, which concludes that any further investigation would not be justified, since ——— ——— was apparently mistaken in the facts conveyed in his affidavit. Accordingly, I ask that you proceed no further with this inquiry, and I apologize for any inconvenience caused to your office in undertaking any inquiry in view of the mootness of this matter.

Thank you very much for your assistance, and I shall continue to submit to you any instances which are called to our attention in which the rights of jurors are apparently violated in this manner.

Sincerely,

CARL H. IMLAY,
General Counsel.

CHEVY CHASE, MD., *June 6, 1975.*

U.S. Government memorandum to: Hon. Jervis S. Finney, U.S. Attorney.
From: Paul R. Schlitz.
Subject:

Attached is a copy of a letter from ——— ———, Petit Juror No. ——— June 1975 Term, who was recently fired from her position as a counter clerk at the ——— ——— in Washington, D.C., which is owned by one——— ———. ——— ——— indicates that her discharge resulted from the fact that she is on jury duty. The Court has requested that I refer this matter to you for appropriate action and particularly whether this constitutes a violation under 18 U.S.C. § 1503.

I am also sending a copy of this letter to Carl Imlay, General Counsel of the Administrative Office of the United States Courts, for whatever consideration he deems appropriate.

PAUL R. SCHLITZ.

Attachment.

CHEVY CHASE, MD., *June 6, 1975.*

Re ——— ———, petit juror No. ———

CLERK OF THE COURT,
U.S. District Court,
U.S. Courthouse,
Baltimore, Md.

DEAR SIR: I would like to report the following chronology of events to you and ask your assistance in directing this to the proper labor officials. I feel that I have been "fired" as a direct result of being on Jury Duty and I want to report this immediately.

In February of this year, after being injured in an automobile accident in December and not being able to return to school, I found a part-time job, counter-help in the ——— ———, ——— ——— ——— ———, N.W., Washington, D.C.; owned: ——— ———.

As my physical condition improved, I was asked to work more hours and was eventually hired as a full-time, 40-hour a week employee. When I received notice of Jury Duty (early in May), I informed ——— ——— of this fact im-

mediately. On Monday, June 2, 1975, I reported for Jury Duty in Baltimore as ordered. Tuesday, I did not have to report to the Court, so called ——— ——— ———" on Monday night and said I would be in for work on Tuesday. I worked my regular schedule on Tuesday and during the day, was called by the Clerk of the Court and told to report to Court on Wednesday morning, June 4. I reported to Court on Wednesday, was not selected for the Jury and again returned home, called work that evening to say I would be in to work on Thursday, and did report to work at 12:00 noon. (My schedule for that particular day was 12:00 Noon to 9:00 P.M.) I worked until 1:30 P.M., at which time I was informed by the Assistant Manager that ——— ——— did not like my attitude, and was summarily "fired" on the spot. My feeling in the matter is that it was hard to schedule my hours due to the fact that I do not know when I will be called to Court and therefore this became a factor that ——— ——— did not want to deal with.

My I request that the attached copy of this letter be directed to the proper Labor officials, or that I be informed immediately to whom I should direct this matter.

Thank you very much for your prompt attention.

Sincerely,

———— ————,

Petit Juror No. ———.

U.S. District Court,
District of South Dakota,
Sioux Falls, S. Dak., March 21, 1975.

Mr. Steven I. Ginsberg,
General Attorney, Office of the General Counsel, Administrative Office for the U.S. Courts, Supreme Court Building, Washington, D.C.

Dear Mr. Ginsberg: Enclosed herewith a copy of a letter dated March 20, 1975, from an employer of a person who is presently serving as foreman of our grand jury. This is the matter which we discussed over the telephone today.

Very truly yours,

William J. Srstka, *Clerk.*

Enclosure.

Lampert Building Center,
Rapid City, S. Dak., March 20, 1975.

Mr. Bill Sirska,
Clerk of Federal Court,
Sioux Falls, S. Dak.

Dear Mr. Sirska: An employee of ours, ———— ————, has been selected to serve on the Grand Jury. He has already served one week in Sioux Falls. He is currently serving in Rapid City, and it is my understanding that the Grand Jury will still be in session next week.

We are now coming into our busy season, and I wish you would consider releasing ——— ——— from any further Grand Jury duty. If you do not find this possible, we will have to hire someone to take over ——— ——— duties.

Thank you very much for your consideration. Please advise your decision at your earliest convenience.

Yours very truly,

———— ————,

———— ————, *Manager.*

[From the Honolulu Star-Bulletin, Tuesday, Jan. 15, 1974]

Watergate Grand Jurors Hurt by Months Away From Jobs

(By Barry Kalb, *Washington Star-News*)

Washington.—Nineteen months of toil has had a substantial impact on the lives of the original Watergate grand jurors and may force some of them to go to court to seek compensation they feel they have been wrongly denied.

According to correspondence between the office of Chief United States District Judge John J. Sirica, the administrative office of the U.S. courts, and the grand jury foreman, Vladimir N. Pregelj, two jurors have lost their jobs as a result of the Watergate investigation's demands on their time.

In addition, Pregelj told a reporter, others on the grand jury have been affected in a less dramatic manner.

"I've lost two weeks of leave," said Pregelj (pronounced pay-gul), a researcher for the Library of Congress. Because of time lost from work, he said, any promotion he may be entitled to will have been set back.

"One woman on the jury is a cleaning woman," he said "Who's going to hire her if they're not sure she can come to work?"

The dispute over compensation involves the daily rate paid to those grand jurors who are not government employes. The 11 government employes on the jury are paid their regular salaries in lieu of the court-paid compensation.

Pregelj, on behalf of the 12 jurors who are affected by the compensation rate, has been corresponding with Sirica's office since mid-October, when he discovered that federal law allows a judge to increase the daily rate from $20 to $25 for jurors who have sat on a case for more than 30 days.

The grand jury was sworn in on June 5, 1972, and it had been expected that the jurors would spend a routine month handling narcotics possession cases and then spend the remaining 17 months of the jury's life on call.

Instead, they were given the Watergate case. Between Sept. 15, 1972, the day they returned the original Watergate indictments, and the end of the resulting trial, after which they expected to hear more witnesses, they were also given the investigation into allegations of police corruption here.

The second case, which resulted in indictments charging District of Columbia police officers with taking payoffs from local gamblers, is now being tried.

As the Watergate cover-up investigation dragged on, the Watergate special prosecutor's office obtained special legislation extending the grand jury's life for six months, and another six months if necessary. Indictments are now expected within the next few weeks.

Pregelj first wrote to Sirica on Oct. 18 noting that "several non-government or self-employed grand jurors have been forced to bear . . . a direct financial loss," and asking him to provide for the higher rate retroactive to the date on which each grand juror passed 30 days of service.

Henry A. Gill Jr., Sirica's administrative assistance, said he was told by the office *of Carl H. Imlay*, general counsel to the administrative office of the U.S. courts, that grand jurors were not entitled to the higher rate.

Although grand jurors were specified in the federal statute, Imlay's office contended, the Congressional debate preceding enactment of the bill showed that it had been meant to apply only to petit jurors.

Sirica took the matter to an executive session of the district court judges here, and on Nov. 19 wrote to Pregelj that the judges had "voted to grant the request in its entirety, including the retroactivity."

Imlay's office then reconsidered and decided that the jurors were entitled to the higher rate—but only from the day of the decision, not retroactively.

Correspondence continued, with Sirica still supporting Pregelj's request. But on Nov. 30, Imlay wrote to Gill:

"We have not budgeted to pay grand jurors $25 per diem as a matter of routine after they have completed 30 attendance days of service, and I regret that that impression may have been created." Imlay continued:

"Though as you state, 'this group of 23 citizens have rendered a truly remarkable service,' you will appreciate the fact that we cannot apply fiscal policy either on an ad hoc basis or on the basis of the importance of any particular inquiry."

On Dec. 5, Sirica wrote Pregelj to say that following Imlay's Nov. 30 letter, the judges "accepted this position with reluctance."

Last week, U.S. Attorney Earl J. Silbert, who was in charge of the original Watergate investigation, said that since the jury was primarily under the jurisdiction of the special Watergate prosecutor, Leon Jaworski, it would be more appropriate for Jaworski to handle the matter.

On Thursday, a spokesman for Jaworski said that while that office was aware of the situation, it did not believe it could do anything. "For all I can determine, it's just an administrative matter" between the jury and the administrative office, the spokesman said.

Meanwhile, Pregelj wrote Sirica on Jan. 4 to question Imlay's ruling and to say that the situation had become worse for some jurors.

One woman, he said, who had been forced "to resign her position several months ago, is still without employment and in a very precarious financial situation," Pregelj wrote.

"Recently," he continued, "another grand juror was dismissed from her job because of her absences due to her service on this grand jury."

Although not every juror sits every day, Pregelj has estimated that the retroactive payment, if granted could total $365 for each affected juror. He said he would continue to press for the full payment.

EXHIBIT A

JUNE 28, 1974.

REPORT ON JURY DISQUALIFICATION BECAUSE OF PENDING FELONY CHARGES OR CONVICTION OF A FELONY

At the January, 1974 meeting of the Committee, Chairman Stanley appointed the undersigned as a subcommittee of one to inquire into current problems involving juror disqualification because of pending charges of a felony or felonies or conviction in a state or federal court for the commission of a felony.

As is familiar ground, § 1865(b)(5) of the Jury Selection and Service Act of 1968 (the "Act") provides as follows:

" * * * any person [is] qualified to serve on grand and petit juries * * * unless he: (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

Thus, any person fitting within the statutory language is disqualified from serving upon a jury in a federal district court.

To effectuate this statutory disqualification language, the present Jury Qualification Questionnaire (JQQ) poses three questions:

1. Were you ever convicted of a State or Federal crime punishable by imprisonment for more than one year?

2. If "yes", were your civil rights restored by pardon or amnesty?

3. Are any such charges pending against you?

These questions and subdivision (5) pose conflicts among policies spelled out in the preamble and other portions of the Act. Further, these questions, and the subdivision on which they are based, are confusing on their face. Finally, they present legal and constitutional infirmities. Obviously, if all or some of these problems are valid and important, it may be necessary to recommend revision of the statutory section quoted hereinabove.

I

Assuming arguendo that the first question is legally permissible—i.e. that it is constitutional to exclude ex-felons from jury service,[1] it nevertheless raises practical and policy considerations of significance. One portion of the legislative history of the Act suggests that probity of the jury, grand or petit, is a purpose thereof:

"The bill also contains some guarantee of 'probity', at least to the extent that persons are disqualified who have charges pending against them for, or have been convicted of, a crime punishable by imprisonment for more than one year. . . ." S. Rep. No. 891, 90th Cong. 1st Sess., Improved Judicial Machinery for the Selection of Federal Juries, at 22.

At least one federal court, indeed, has agreed to the extent of upholding the constitutionality of the jury disqualification provisions on the ground of assuring the "probity" of the jury. *United States* v. *Arnett*, 342 F. Supp. 1255, 1261 (D. Mass. 1970).

But other legislative comments concerning the disqualification provisions of § 1865(b) strongly suggest that subjective qualification requirements may not be employed thereunder. See House Report at p. 313; see, also, Senate Report at p. 31. These portions of the legislative history emphasize that disqualification must be made on objective grounds by objective evidence. But probity, it is submitted, can be a slippery concept. Like beauty, it depends largely upon the eyes of the beholder. Of course, most courts have held or implied that felons and ex-felons lack probity. Common sense, if nothing else, should convince us that this in fact is not always the case.

Moreover, a plausible argument could be made that the first question offends not only our notions of fairness and common sense, but express purposes of the Act as set forth in its early provisions.

To illustrate, the second sentence of § 1861 of the Act provides:

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[1] See *Richardson* v. *Ramirez*, 418 U.S. —, decided June 24, 1974.

"It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

Similarly, as is well known, § 1862 of the Act expressly prohibits discrimination in the federal grand and petit jury selection process. Thus, given the traditional notion that once a person has paid the penalty for criminal conduct by serving his sentence as imposed, it can be said that a simple affirmative answer to question "1" should not necessarily disqualify that person from jury service. Thus, we are led to consideration of the second question on the JQQ.

II

The second question, in the view of the writer, raises serious problems, some of which have been hinted at above. To illustrate, following the theme of the discussion so far, it can be argued that if the answer is "yes" to question "1", then question "2" should require the person filling out the form to state the date and nature of the conviction and whether or not he has served completely the sentence imposed—i.e., any commitment period plus parole, or a period of probation, or full payment of the fine. Assuming that one convicted of a felony has nevertheless served or disposed of his sentence in full, then it might be rational to regard such a person qualified for jury duty on the theory that he has "paid his debt to society."

Treating question "2" as it is presently written, there are additional serious problems. First, as counsel to the Committee has reported to us, United States Pardon Attorney Lawrence M. Traylor has noted that in our system there are four forms of clemency: pardon, reprieve, remission of fine, and commutation of sentence. Thus, limiting question "2" to only one of these four possibilities renders it obviously under-inclusive. Pardon, moreover, is rather obscure under existing practice and law in the federal system; certainly, it does not expunge the record of a conviction in modern federal practice. Rather, it merely relieves the recipient of legal disabilities that have resulted by virtue of federal law. Among other things, this means that it is uncertain whether a pardon for a federal conviction restores civil rights which may accrue to the pardoned person by virtue of state law—or, for that matter, by federal law! Finally, it is to be noted that, practically speaking, a pardon operates in a discretionary fashion. Put differently, obtaining a pardon in the federal system requires financial resources and perhaps political influence or support.

The word "amnesty" contained in the second question is almost totally devoid of any substantial legal content in modern times. As Mr. Traylor's observations underscore, the word "amnesty" is not to be found in any meaningful way in the federal statutes, and the same apparently can be said for the laws of most of the states. Literally, amnesty, as interpreted by the courts, means the abolition or "forgetting" of an offense. *Knote* v. *United States*, 95 U.S. 149, 152 (1877). Thus, if the offense is "forgotten" or ignored, the beneficiary has no civil rights to be restored.

A further infirmity in question "2" is that, by its terms, it does not deal with expunction or certification, which indeed are specifically provided by certain federal statutes, most notably § 844 of Title 21 and the Federal Youth Offender Act. See 18 U.S.C. § 5021.

Worst of all, the second question narrowly confines restoration of civil rights to two methods, in fact, the laws of states have many and varied ways of restoration of rights of criminal offenders. In recent years, these state statutes have become increasingly subject to study and review. Today, some thirteen states have procedures whereby the civil rights of an offender are automatically restored upon fulfillment of certain conditions enumerated in the state constitutions or general statutes. See 23 Vanderbilt L.R. 929, at 1147 (1970); 11 Am. Cr.L.R. 727 (1974). In at least three states, New Hampshire, Oregon and Wisconsin, civil rights are restored automatically upon completion of the prison sentence, probation or parole. Kansas and Ohio require the offender to complete only his prison term or parole period in order to have his civil rights restored.

About one-quarter of the fifty states have some sort of other expungement or annulment procedures designed to effectively recognize the stigmatization of a conviction but realistically restore the offender to society. It would be interesting to discuss further the various kinds of state laws in detail, but it is really unnecessary to make the obvious point that the second question on the JQQ is not only incomplete in respect to federal law, but more important, it

turns upon the vagaries of the state laws without recognizing what they are. As stated above, question "2" is clearly under-inclusive in terms of federal law—and even more so in terms of state law. A plainer problem of denial of equal protection of the laws can scarcely be imagined.

III

Question number "3", "[A]re any such charges pending against you?" apparently has not been the subject of any criticism either in the courts or by commentators. In a sense, this is surprising in that one can view this question as cutting athwart the American presumption of innocence of all charges of criminal conduct. From another viewpoint, however, there are practical reasons—some reflected in the legislative history of § 1865(b)—in support of the proposition that persons facing criminal charges themselves should not sit on juries resolving criminal charges against others. Presumably, they would labor under pressure, and in many instances, their ability to be present for jury service would be affected by their own court commitments. Still, the nub of the problem here is whether or not persons who answer question number "3" in the affirmative should be disqualified, without more, from service. The Congress has obviously answered that question in the affirmative.

Nonetheless, it is suggested that this Committee should ponder whether or not the pendency of charges against a citizen is a sound reason to absolutely disqualify him from jury service. It is possible that the Committee might prefer to have the information resulting from this question lead not to disqualification but merely to challenges by the parties in a given piece of litigation.

CONCLUSION

Brief and superficial as this paper necessarily is, it should be sufficient to demonstrate that § 1865(b)(5) and the related three JQQ questions present a melange of uncertainties and conflicting policy considerations. Although the recent decision of *Richardson* v. *Ramirez* removes the threat of immediate constitutional problems in this area, this is not to say that there will not be further litigation in the immediate future centering upon this part of the disqualification section of the Act.

To summarize, then, it is respectfully submitted that this Committee should ponder all three questions to the JQQ with a view to recommending changes in subdivision 5:

1. Question number "1" may continue to be useful and appropriate, but thought should be given to what happens when the answer is "yes". Then consideration should be given to allowing persons to serve if they have actually fully discharged their imposed sentences.

2. Question number "2" in many respects is totally unsatisfactory as a matter of common sense and law for reasons hereinabove stated. Most of the problems would be removed if, as already suggested, the law were changed to allow persons who have completely served their sentences to avoid disqualification under the Act.

3. Question number "3" and its statutory underpinning may be completely satisfactory as far as they go. Nonetheless, the Committee should ponder whether or not pending criminal charges against a potential juror are sufficient ground for absolute disqualification as opposed to challenge later during the voir dire.

Finally, if it would serve the interest of the Committee as a whole, a draft of a proposed change in the statute and the questions could be submitted and circulated in the near future.

(Signed) HAROLD R. TYLER, JR.

ADMINISTRATIVE OFFICE OF THE
U.S. COURTS,
Washington, D.C., October 20, 1977.

Mr. MICHAEL ALTIER, Esquire,
Counsel, Senate Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR MIKE: This letter is in response to your telephonic request for an estimate as to the costs which would be incurred by the government through the enactment of S. 2072, S. 2074 and S. 2075.

First, with respect to S. 2075, our Division of Financial Management has made the following estimates of increased expenditures which would be attributable to

the increases in juror compensation provided in this bill. These estimates are annual figures intended to show the anticipated increase in each category over and above our original budget estimate for the current fiscal year:

	1978 budget estimate	Revised estimate	Projected increase
Attendance fees:			
Regular service	$17,250,000	$25,875,000	$8,625,000
Exceeds 30 days	300,000	300,000	
Subsistence	800,000	1,760,000	960,000
Mileage	3,950,000	6,125,000	2,175,000
Parking		990,000	990,000
Meals and lodging (sequestered)	550,000	550,000	
Total increase			12,750,000

With respect to Section 3 of S. 2075, it seems to me that there should be no anticipated net costs attributable to these provisions. Under this section, there will occasionally be government expenditures to provide attorneys for aggrieved jurors. However, it can reasonably be anticipated that these instances will be rare, and any such costs will likely be offset by the provision for a civil penalty of up to $10,000 to be assessed on behalf of the United States against employers who violate this section by encroaching on the rights of their employees with respect to federal jury service.

On the subject of any projected increased government expenditures which might result from the enactment of S. 2072, I am enclosing a portion of the Jury Committee's report to the Judicial Conference in September 1976 addressing this subject. Here again, any increased expenditures should be of a very minor nature, as illustrated by the Jury Committee's report.

In accordance with our discussion, the only anticipated cost increases attributable to S. 2074 would derive from Title 5 of that bill, extending Federal Employees Compensation Act coverage to federal jurors. A reliable cost estimate on this matter seems difficult to derive. It is our estimate that injuries to jurors are relatively rare and would normally be of a minor nature so that no substantial compensation expenses would be incurred. For whatever assistance it may provide, I am enclosing a statistical extract from the Department of Labor regarding the operation of the Federal Employees Compensation Act with respect to employment coverage. This report indicates that during the fiscal year 1976, almost three million federal employees qualified for coverage under the Act. The number of injury cases reported during that fiscal year was 191,172, and total expenditures for the Federal Employees Compensation Act coverage during the year were $477,177,290. By my calculations, this comes to an average expenditure of about $2,495 per occurrence. Since jurors do not work under conditions which could be considered as dangerous or as having the potential for serious injury beyond the normal falls and other minor accidents which are the primary matters of this kind coming to our attention, it seems to me reasonable to estimate that the number of injured jurors eligible for compensation would be relatively few, amounting perhaps to no more than 200 a year, and the usual costs per occurrence should be far below the average figure for federal employees, probably in the vicinity of $100 per occurrence.

I hope that these thoughts are helpful in estimating the increased expenditures attributable to these bills.

Sincerely,

WILLIAM R. BURCHILL, JR.,
Associate General Counsel.

Enclosures.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., November 4, 1977.

HON. DENNIS DECONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR DECONCINI: In further reference to my correspondence of October 27, 1977, I am forwarding some additional items which may be of use in your subcommittee's consideration of S. 2072, S. 2074, and S. 2075 with respect to federal juries.

First I am enclosing a page from the pictorial summary of United States courts statistics for the 12-month period ending June 30, 1977. This extract

presents a graphic illustration of the progress which has been made in promoting efficient petit juror utilization in the United States district courts, as discussed in our testimony.

I am also enclosing some statistical material further describing the status of juror utilization in the district courts. Enclosed are several statistical tables from the recent Annual Report of the Director of the Administrative Office for the 12-month period ending June 30, 1977, and a publication entitled Juror Utilization in United States District Courts for fiscal year 1976. The latter publication for the fiscal year 1977 is not yet available but will appear within approximately two months.

I hope that these materials may be of assistance to the subcommittee. If there is any further information which I should provide, please advise this office.

Sincerely,

CARL H. IMLAY, *General Counsel.*

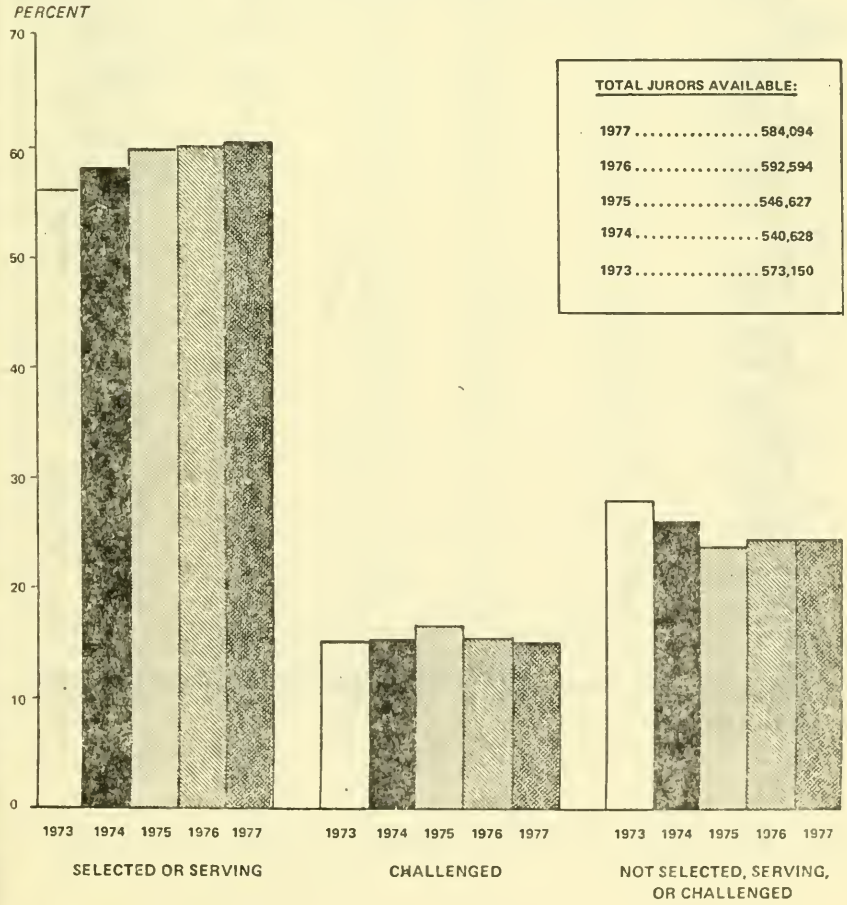
Enclosures.

[From : United States Courts : A Pictorial Summary 1977]

UNITED STATES DISTRICT COURTS

PETIT JUROR USAGE

12 MONTHS ENDED JUNE 30, 1973–1977



[Taken from 1977 Annual Report of the Director of the Administrative Office]

TABLE J-1.—NUMBER OF GRAND JURIES, U.S. DISTRICT COURTS, STATISTICAL YEAR 1977

District	Number on July 1, 1976	Number impaneled in the 12-mo period	Number discharged in the 12-mo period	Number on June 30, 1977	Total number in existence in the 12-mo period
Total all districts	[1] 343	298	295	346	641
District of Columbia	[1] 12	11	9	14	23
1st circuit:					
Maine	2	2	2	2	4
Massachusetts	[1] 8	6	5	9	14
New Hampshire	1			1	1
Rhode Island	1	2	1	2	3
Puerto Rico	2	1	1	2	3
2d circuit:					
Connecticut	5	6	5	6	11
New York:					
Northern	2	5	6	1	7
Eastern	[1] 18	17	20	15	35
Southern	32	21	21	32	53
Western	3	2	3	2	5
Vermont	2	2	2	2	4
3d circuit:					
Delaware	2	1	1	2	3
New Jersey	6	5	4	7	11
Pennsylvania:					
Eastern	8	3	4	7	11
Middle	4	2	3	3	6
Western	6	3	2	7	9
Virgin Islands [2]					
4th circuit:					
Maryland	6	7	7	6	13
North Carolina:					
Eastern	1	2	2	1	3
Middle	1	1	1	1	2
Western	2	2	2	2	4
South Carolina	1	1	1	1	2
Virginia:					
Eastern	9	8	10	7	17
Western	6	9	9	6	15
West Virginia:					
Northern	1	1	1	1	2
Southern	2	3	1	4	5
5th circuit:					
Alabama:					
Northern	1	2	2	1	3
Middle		1		1	1
Southern	1	2	1	2	3
Florida:					
Northern	2	2	2	2	4
Middle	7	5	5	7	12
Southern	12	7	7	12	19
Georgia:					
Northern	[1] 5	5	5	5	10
Middle	3	2	3	2	5
Southern	2	1	1	2	3
Louisiana:					
Eastern	4	4	2	6	8
Middle	1	3	3	1	4
Western	5	5	7	3	10
Mississippi:					
Northern	1	1	1	1	2
Southern	1	1	1	1	2
Texas:					
Northern	9	5	8	6	14
Eastern	2	1	2	1	3
Southern	[1] 6	7	7	6	13
Western	10	9	8	11	19
Canal zone [2]					
6th circuit:					
Kentucky:					
Eastern	3	2	3	2	5
Western	3	1	1	3	4

See footnotes at end of table.

TABLE I—1.—NUMBER OF GRAND JURIES, U.S. DISTRICT COURTS, STATISTICAL YEAR 1977—Continued

District	Number on July 1, 1976	Number impaneled in the 12-mo period	Number discharged in the 12-mo period	Number on June 30, 1977	Total number in existence in the 12-mo period
Michigan:					
Eastern	9	11	7	13	20
Western	1	1	1	1	0
Ohio:					
Northern	6	4	3	7	10
Southern	4	3	3	4	7
Tennessee:					
Eastern	2	3	1	4	5
Middle	1	1	1	1	2
Western	1	2	1	2	3
7th circuit:					
Illinois:					
Northern	8	14	14	8	22
Eastern	1	---	---	1	1
Southern	3	2	2	3	5
Indiana:					
Northern	3	1	1	3	4
Southern	1	3	3	1	4
Wisconsin:					
Eastern	2	2	1	3	4
Western	1	1	1	1	2
8th circuit:					
Arkansas:					
Eastern	2	1	1	2	3
Western	---	1	---	1	1
Iowa:					
Northern	2	2	2	2	4
Southern	2	---	1	1	2
Minnesota	1	1	1	1	2
Missouri:					
Eastern	4	2	3	3	6
Western	3	---	1	2	3
Nebraska	1	1	1	1	2
North Dakota	1	1	1	1	2
South Dakota	2	2	2	2	4
9th circuit:					
Alaska	1	1	1	1	2
Arizona	4	3	2	5	7
California:					
Northern	4	5	3	6	9
Eastern	(1)	1	---	2	2
Central	18	15	21	12	33
Southern	8	5	5	8	13
Hawaii	2	1	1	2	3
Idaho	2	1	2	1	3
Montana	---	1	---	1	1
Nevada	2	3	2	3	5
Oregon	3	2	3	2	5
Washington:					
Eastern	1	1	1	1	2
Western	2	---	---	2	2
Guam	1	1	1	1	2
10th circuit:					
Colorado	1	1	1	1	2
Kansas	3	3	3	3	6
New Mexico	3	2	2	3	5
Oklahoma:					
Northern	1	1	1	1	2
Eastern	1	1	1	1	2
Western	1	1	1	1	2
Utah	2	---	---	2	2
Wyoming	---	1	---	1	1

[1] Revised to more accurately reflect the number of pending grand juries.
[2] The districts of Virgin Islands and Canal Zone reported no grand juries in existence during the 12-mo period, July 1, 1976–June 30, 1977.

TABLE J-2.—GRAND JUROR USAGE, U.S. DISTRICT COURTS, STATISTICAL YEAR 1977

District	Sessions convened	Jurors in session	Hours in session	Average number of jurors per session	Average number of hours per session
Total all districts	8,849	175,687	47,094	19.9	5.32
District of Columbia	681	13,840	3,269	20.3	4.80
1st circuit:					
Maine	14	276	88	19.7	6.29
Massachusetts	230	4,488	1,082	19.5	4.70
New Hampshire	11	234	57	21.3	5.18
Rhode Island	37	714	219	19.3	5.92
Puerto Rico	39	765	230	19.6	5.90
2nd circuit:					
Connecticut	102	2,015	623	19.8	6.11
New York:					
Northern	63	1,254	269	19.9	4.27
Eastern	477	9,492	2,042	19.9	4.28
Southern	990	19,905	4,210	20.1	4.25
Western	101	1,925	448	19.1	4.44
Vermont	35	673	208	19.2	5.94
3d circuit:					
Delaware	48	948	179	19.8	3.73
New Jersey	270	5,054	1,483	18.7	5.49
Pennsylvania:					
Eastern	304	5,864	1,323	19.3	4.35
Middle	57	1,090	276	19.1	4.84
Western	106	1,994	657	18.8	6.20
Virgin Islands [1]					
4th circuit:					
Maryland	167	3,346	685	20.0	4.10
North Carolina:					
Eastern	20	409	129	20.4	6.45
Middle	16	329	90	20.6	5.62
Western	23	441	149	19.2	6.48
South Carolina	27	519	190	19.2	7.04
Virginia:					
Eastern	116	2,294	720	19.8	6.21
Western	29	570	179	19.7	6.17
West Virginia:					
Northern	8	178	49	22.2	6.12
Southern	28	565	191	20.2	6.82
5th circuit:					
Alabama:					
Northern	26	569	194	21.9	7.46
Middle	9	202	54	22.4	6.00
Southern	44	904	309	20.5	7.02
Florida:					
Northern	15	327	88	21.8	5.87
Middle	154	3,018	941	19.6	6.11
Southern	281	5,579	1,628	19.9	5.79
Georgia:					
Northern	130	2,524	835	19.4	6.42
Middle	44	877	336	19.9	7.64
Southern	20	352	82	17.6	4.10
Louisiana:					
Eastern	132	2,574	822	19.5	6.23
Middle	48	978	253	20.4	5.27
Western	51	1,087	334	21.3	6.55
Mississippi:					
Northern	20	410	130	20.5	6.50
Southern	25	557	139	22.3	5.56
Texas:					
Northern	134	2,671	884	19.9	6.60
Eastern	32	609	190	19.0	5.94
Southern	144	2,891	861	20.1	5.98
Western	147	2,991	744	20.3	5.06
Canal zone [1]					
6th circuit:					
Kentucky:	16	327	79	20.4	4.94
Eastern	101	1,961	581	19.4	5.75
Western					
Michigan:					
Eastern	302	6,063	1,697	20.1	5.62
Western	15	286	82	19.1	5.47
Ohio:					
Northern	145	2,932	796	20.2	5.49
Southern	67	1,336	459	19.9	6.85
Tennessee:					
Eastern	17	339	98	19.9	5.76
Middle	17	341	99	20.1	5.82
Western	89	1,784	621	20.0	6.98

See footnotes at end of table.

TABLE J-2.—GRAND JUROR USAGE, U.S. DISTRICT COURTS, STATISTICAL YEAR 1977—Continued

District	Sessions convened	Jurors in session	Hours in session	Average number of jurors per session	Average number of hours per session
7th circuit:					
Illinois:					
Northern	388	8,091	2,074	20.9	5.35
Eastern	26	507	148	19.5	5.69
Southern	40	810	249	20.2	6.22
Indiana:					
Northern	60	1,197	364	20.0	6.07
Southern	57	1,154	349	20.2	6.12
Wisconsin:					
Eastern	84	1,661	524	19.8	6.24
Western	20	393	115	19.6	5.75
8th circuit:					
Arkansas:					
Eastern	28	595	158	21.2	5.64
Western	10	221	57	22.1	5.70
Iowa:					
Northern	45	916	313	20.4	6.96
Southern	16	297	104	18.6	6.50
Minnesota	70	1,364	349	19.5	4.99
Missouri:					
Eastern	102	1,922	514	18.8	5.04
Western	53	945	374	17.8	7.06
Nebraska	16	348	112	21.8	7.00
North Dakota	11	235	63	21.4	5.73
South Dakota	24	528	132	22.0	5.50
9th circuit:					
Alaska	25	536	135	21.4	5.40
Arizona	142	2,692	820	19.0	5.77
California:					
Northern	140	2,722	779	19.4	5.56
Eastern	40	831	146	20.8	3.65
Central	405	7,799	2,083	19.3	5.14
Southern	168	3,335	827	19.9	4.92
Hawaii	60	1,144	371	19.1	6.18
Idaho	32	610	240	19.1	7.50
Montana	8	164	55	20.5	6.88
Nevada	139	2,691	760	19.4	5.47
Oregon	67	1,349	336	20.1	5.01
Washington:					
Eastern	13	255	78	19.6	6.00
Western	53	1,123	373	21.2	7.04
Guam	15	308	59	20.5	3.93
10th circuit:					
Colorado	44	793	332	18.0	7.55
Kansas	42	860	289	20.5	6.88
New Mexico	43	877	228	20.4	5.30
Oklahoma:					
Northern	25	483	165	19.3	6.60
Eastern	23	485	151	21.1	6.57
Western	21	432	150	20.6	7.14
Utah	65	1,244	300	19.1	4.62
Wyoming	5	99	37	19.8	7.40

[1] The districts of Virgin Islands and Canal Zone reported no grant juries in existence during the 12-mo period, July 1, 1976–June 30, 1977.

TABLE J-3.—PLTIT JUROR USAGE REPORTS—TOTALS, STATISTICAL YEAR 1977

District	Number of Juror days				Jury trial days			Juror usage index[1]
	Total available	Percent selected or serving	Percent challenged	Percent not selected, serving or challenged	Total	Percent civil	Percent criminal	
Total all districts	584,094	60.4	15.5	24.1	29,873	43.3	56.7	19.55
District of Columbia	10,663	56.3	15.7	28.0	494	31.8	68.2	21.59
1st circuit:								
Maine	1,586	54.0	12.1	33.9	66	31.8	68.2	24.03
Massachusetts	9,018	71.0	12.7	16.3	561	39.6	60.4	16.07
New Hampshire	1,901	58.8	17.7	23.5	105	60.0	40.0	18.10
Rhode Island	1,620	77.5	9.8	12.7	104	54.8	45.2	15.58
Puerto Rico	5,192	43.3	13.7	43.0	207	44.9	55.1	25.08

See footnotes at end of table.

TABLE J-3.—PETIT JUROR USAGE REPORTS—TOTALS, STATISTICAL YEAR 1977

District	Number of Juror days				Jury trial days			
	Total available	Percent selected or serving	Percent chal-lenged	Percent not selected, serving or chal-lenged	Total	Percent civil	Percent criminal	Juror usage index[1]
2d circuit:								
Connecticut	5,651	70.5	20.7	8.8	261	37.5	62.5	21.65
New York:								
Northern	2,872	46.3	8.1	45.6	121	47.9	52.1	23.74
Eastern	25,346	53.7	13.4	32.9	1,100	31.1	68.9	23.04
Southern	47,125	54.2	15.6	30.2	2,196	41.7	58.3	21.46
Western	6,457	70.2	8.9	20.9	299	27.1	72.9	21.60
Vermont	2,654	61.3	13.3	25.4	167	60.5	39.5	15.89
3d circuit:								
Delaware	1,130	60.4	24.2	15.4	63	39.7	60.3	17.94
New Jersey	19,304	68.9	10.9	20.2	1,023	33.9	66.1	18.87
Pennsylvania:								
Eastern	31,594	55.8	19.1	25.1	1,745	70.1	29.9	18.11
Middle	4,342	76.0	15.2	8.8	244	63.9	36.1	17.80
Western[2]	13,273	56.6	16.3	27.1	676	48.5	51.5	19.63
Virgin Islands	5,438	48.8	21.3	29.9	160	34.4	65.6	33.99
4th Circuit:								
Maryland	15,041	54.6	14.1	31.3	648	35.2	64.8	23.21
North Carolina:								
Eastern[2]	2,215	59.2	9.1	31.7	90	36.7	63.3	24.61
Middle	1,047	73.1	13.3	13.6	63	15.9	84.1	16.62
Western	2,675	76.3	10.8	12.9	183	66.1	33.9	14.62
South Carolina	7,411	71.0	13.2	15.8	399	55.9	44.1	18.57
Virginia:								
Eastern	5,093	49.2	36.8	14.0	276	55.4	44.6	18.45
Western	1,522	57.6	37.3	5.1	99	81.8	18.2	15.37
West Virginia:								
Northern	854	60.5	24.7	14.8	49	38.8	61.2	17.43
Southern	2,037	47.9	23.8	28.3	102	52.9	47.1	19.97
5th circuit:								
Alabama:								
Northern	5,675	53.7	19.4	26.9	328	67.1	32.9	17.30
Middle	3,209	75.0	11.1	13.9	181	49.7	50.3	17.73
Southern	2,041	80.8	13.0	6.2	128	50.8	49.2	15.95
Florida:								
Northern	2,053	69.7	14.5	15.8	103	25.2	74.8	19.93
Middle	10,567	67.0	12.4	20.6	531	16.6	83.4	19.90
Southern	14,477	52.8	13.2	34.0	637	24.8	75.2	22.73
Georgia:								
Northern	12,042	56.2	19.8	24.0	573	25.5	74.5	21.02
Middle[2]	3,819	64.9	23.3	11.8	191	47.1	52.9	19.99
Southern[2]	3,102	76.8	17.6	5.6	153	71.9	28.1	20.27
Louisiana:								
Eastern	9,099	59.0	23.2	17.8	581	76.6	23.4	15.66
Middle	452	38.5	33.4	28.1	17	29.4	70.6	26.59
Western	2,665	53.8	21.6	24.6	155	69.0	31.0	17.19
Mississippi:								
Northern	3,983	64.2	19.2	16.6	200	46.0	54.0	19.92
Southern	3,446	58.9	16.1	25.0	151	79.5	20.5	22.82
Texas:								
Northern	10,779	69.2	13.3	17.5	591	61.6	38.4	18.24
Eastern	4,179	65.9	15.0	19.1	233	82.8	17.2	17.94
Soutern	11,699	67.3	11.9	20.8	513	30.2	69.8	22.81
Westhern	8,378	61.3	17.1	21.6	354	29.1	70.9	23.67
Canal zone[2]	150	59.3	6.0	34.7	7	----------	100.0	21.43
6th circuit:								
Kentucky:								
Eastern	5,156	58.3	11.4	30.3	219	19.6	80.4	23.54
Western	3,286	53.9	15.9	30.2	150	24.0	76.0	21.91
Michigan:								
Eastern[2]	21,379	67.4	9.8	22.8	1,088	34.7	65.3	19.65
Western	2,813	81.9	8.3	9.8	164	47.6	52.4	17.15
Ohio:								
Northern	9,337	54.4	8.2	37.4	457	48.4	51.6	20.43
Southern[2]	5,438	68.1	13.2	18.7	294	58.2	41.8	18.50
Tennessee:								
Eastern	4,198	62.5	14.2	23.3	272	66.2	33.8	15.43
Middle	3,734	49.9	11.2	38.9	156	35.3	64.7	23.94
Western	5,315	69.1	17.2	13.7	308	34.1	65.9	17.26

TABLE J-3.—PETIT JUROR USAGE REPORTS—TOTALS, STATISTICAL YEAR 1977

District	Number of juror days				Jury trial days			
	Total available	Percent selected or serving	Percent challenged	Percent not selected, serving or challenged	Total	Percent civil	Percent criminal	Juror usage index [1]
7th circuit:								
Illinois:								
Northern	19,464	63.6	9.6	26.8	1,114	38.3	61.7	17.47
Eastern	2,426	65.7	24.9	9.4	132	45.5	54.5	18.38
Southern	1,504	62.1	18.6	19.3	72	18.1	81.9	20.89
Indiana:								
Northern	6,634	59.1	16.3	24.6	317	26.8	73.2	20.93
Southern	3,358	60.6	17.7	21.7	191	40.3	59.7	17.58
Wisconsin:								
Eastern	4,871	68.0	15.9	16.1	308	49.7	50.3	15.81
Western	516	71.3	24.0	4.7	27	14.8	85.2	19.11
8th circuit:								
Arkansas:								
Eastern [2]	4,223	57.2	25.0	17.8	202	37.1	62.9	20.91
Western [2]	2,292	58.7	24.1	17.2	98	79.6	20.4	23.39
Iowa:								
Northern	1,672	65.1	15.4	19.5	117	68.4	31.6	14.29
Southern	2,832	69.3	17.9	12.8	178	51.1	48.9	15.91
Minnesota	6,045	60.4	18.5	21.1	343	41.7	58.3	17.62
Missouri:								
Eastern	6,030	54.9	25.1	20.0	346	53.2	46.8	17.43
Western	3,748	48.3	25.4	26.3	164	39.6	60.4	22.85
Nebraska	3,795	57.8	19.6	22.6	246	71.1	28.9	15.43
North Dakota [2]	2,582	61.3	15.5	23.2	126	23.8	76.2	20.49
South Dakota	2,999	48.7	19.4	31.9	131	45.8	54.2	22.89
9th circuit:								
Alaska	2,129	62.9	13.5	22.6	118	41.5	58.5	18.04
Arizona	8,773	57.4	27.0	15.6	407	5.2	94.8	21.55
California:								
Northern	12,211	65.9	12.7	21.4	728	44.8	55.2	16.77
Eastern	3,417	53.5	9.5	37.0	152	19.7	80.3	22.48
Central	20,955	61.3	10.3	28.4	1,060	29.5	70.5	19.77
Southern	10,433	60.1	17.0	22.9	459	13.3	86.7	22.73
Hawaii	1,727	58.1	33.6	8.3	85	23.5	76.5	20.32
Idaho	1,624	59.1	18.1	22.8	98	56.1	43.9	16.57
Montana	2,729	68.3	14.3	17.4	159	57.9	42.1	17.16
Nevada	3,555	49.4	11.8	38.8	153	35.3	64.7	23.24
Oregon	3,813	54.9	22.4	22.7	238	64.7	35.3	16.02
Washington:								
Eastern	1,145	58.4	20.6	21.0	59	40.7	59.3	19.41
Western	4,740	59.1	18.8	22.1	250	27.6	72.4	18.96
Guam	420	20.5	16.4	62.1	7	14.3	85.7	60.00
10th circuit:								
Colorado	5,031	64.5	16.9	18.6	300	23.3	70.7	16.77
Kansas	3,982	63.2	15.4	21.4	235	55.1	44.9	16.87
New Mexico	4,088	66.6	17.8	15.6	233	53.2	46.8	17.55
Oklahoma:								
Northern	2,645	69.0	13.6	17.4	133	24.1	75.9	19.89
Eastern	1,322	68.8	18.1	13.1	90	51.1	48.9	14.69
Western	3,993	70.8	15.0	14.2	296	52.4	47.6	13.49
Utah	3,370	52.1	11.1	36.8	144	59.7	40.3	23.40
Wyoming	1,469	68.2	10.6	21.2	120	75.8	24.2	12.24

[1] Total available jurors divided by total jury trial days giving the average number of jurors available per jury trial per day.
[2] Indicates those districts which have not yet adopted local rules reducing the size of the civil juries.

Senator DeConcini.

Our next witnesses are Kevin D. Rooney, Assistant Attorney General for Administration of the Department of Justice; Mr. William H. Russel, Assistant Director for Administration, U.S. Marshals Service; and Mr. John Beal, Attorney for the Office for Improvements in the Administration of Justice.

Mr. Rooney, we thank you and your colleagues for joining us today.

STATEMENT OF KEVIN D. ROONEY, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY WILLIAM H. RUSSELL, ASSISTANT DIRECTOR FOR ADMINISTRATION, U.S. MARSHALS SERVICE, AND JOHN BEAL, ATTORNEY, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Mr. ROONEY. Mr. Chairman and members of the subcommittee, my name is Kevin D. Rooney. As Assistant Attorney General for Administration, I am responsible for supervising and assisting in the preparation, execution, and accounting of appropriations for the Department of Justice.

I am pleased to appear before you on behalf of the Attorney General to present the Department's views on three bills pertaining to court fees.

The first of these bills, S. 2016, would delegate to the Attorney General the authority to determine and adjust the fees charged for service of civil process for private litigants. The need for an adjustment in these rates is clearly demonstrated by the fact that the estimate aggregate collections by the Government in fiscal year 1976 were approximately $3.5 million below the estimated costs for providing service.

If the Attorney General were given authority to adjust the rates annually, the Government's reimbursement would be more in line with the actual costs. Moreover, payment of fees for U.S. Marshals Service legal and judicial services are deposited in the General Fund of the U.S. Treasury and therefore do not accrue to the benefit of the U.S. Marshals Service.

The present rates of $3 for the service of writs and summonses and $2 for the service of subpoenas were established by Public Law No. 87–621, 28 U.S.C. 1921, on August 31, 1962. This law also provides for the collection of 12 cents per mile for travel required in serving process, except within the District of Columbia.

Three audits, with findings that support the need to revise these rates, have been conducted over the past 8 years. These include a 1969 audit by the General Accounting Office—the GAO—and a June 1973 audit by the Department of Justice's Internal Audit Staff, as well as a second GAO audit in 1975. All three audits have shown that the costs to the Government far exceed collections.

In establishing or revising rates for the service of process, the Attorney General will act in compliance with Office of Management and Budget—OMB—circular A–25 guidelines. OMB circular A–25 articulates the general policy of the executive branch to develop an equitable and uniform system of charges for selected Government services.

The circular provides that a reasonable charge be made to each identifiable recipient for a measurable unit or amount of Government service from which he derives a special benefit. The circular further states that, when determining such charges, the agency shall apply accepted cost accounting principles and include in those charges salaries, benefits, travel, rent, postage, maintenance, and depreciation, as well as cost of operating equipment and a reasonable, proportionate share of the agency's management and supervisory costs.

The service of process by the U.S. Marshals Service is not mandatory for private litigants. It is possible for private litigants to use commercial firms for this purpose. However, since the fees of the Federal Government are much lower, the private litigants prefer to use the U.S. Marshals Service.

According to the GAO survey completed in 1975, the commercial process service fees in five Federal districts ranged from $3 to $35 for delivery of process, with an average of approximately $11. Some commercial firms included in the survey charged additional amounts for services which are provided at no extra cost by the U.S. Marshals, such as priority service.

To meet the standards set forth in circular A–25, it would be necessary for the U.S. Marshals Service to charge an average rate of $11 per item served. Accordingly, this bill will allow for annual adjustments in the rates for service of process.

With regard to the second bill before your subcommittee, S. 2049 would increase the attendance fee and revise the method of computing subsistence and travel allowances for Federal witnesses under 28 U.S.C. 1821. The present fees and allowances paid to Government witnesses, pursuant to section 1821, fail to compensate non-Government employees for the actual costs which they routinely encounter while serving as witnesses. Only Federal Government employees who are authorized by their agencies to appear as Federal witnesses receive a reasonable rate of compensation under 5 U.S.C. 5702 and 5704.

The proposed legislation would alleviate these difficulties by raising the attendance fee for all Federal witnesses and rendering subsistence and travel fees for witnesses who are not salaried employees of the Government commensurate with those provided to Federal employees.

While witness service is a civil obligation, it is important that the witness fee be sufficient to demonstrate that this is an essential public service, and to encourage witnesses to render their services freely and fully.

In 1968 the daily attendance fee for Federal witnesses was set at $20. This fee was an approximation of the average daily income of $22.80 for "production, non-supervisory, non-agricultural, private payroll" employees at that time, according to the U.S. Bureau of Labor Statistics, Department of Labor, "17 Employment and Earnings 146," of January 1971. Workers in that category now earn an average of $38 a day, according to the U.S. Bureau of Labor Statistics, Department of Labor, "22 Employment and Earnings 74," of May 1976.

In order that the witness fee may be at a level that provides fair compensation for a witness' time and efforts, we are recommending that the witness fee be increased to $30 a day.

The Justice Department believes that witnesses in general should be entitled to the same allowances for travel by privately owned vehicles or common carriers as Government employees receive for similiar travel. Presently, travel allowances under section 1821 are restricted to a flat fee of 10 cents a mile, regardless of the mode of travel used by the witness.

Rather than increase the mileage allowance for which this section now provides, the Department of Justice proposes that section 1821 be amended to allow the computation of travel fees in a manner more

closely attuned to the actual travel costs incurred by witnesses and the form of transportation employed.

In 1956, when the Department of Justice recommended the computation of travel allowances for witnesses based solely on a uniform table of distances, the intent of this provision was to standardize payment among those witnesses who travel equal distances.

Subsequent experience with this method of calculating travel fees for witnesses who use commercial carriers has shown that witnesses traveling one-way or over short distances frequently incur personal financial burdens, while those who travel greater distances often realize financial windfalls.

To eliminate such problems resulting from the use of commercial carriers, we propose that section 1821 be amended to provide for the actual expenses of travel at the most economical rate available, as is currently provided for Federal employees in 5 U.S.C. 5704.

Under S. 2049, witnesses who travel by means of privately owned vehicles would continue to receive compensation in the form of mileage allowances. However, as noted above, the present allowance of 10 cents a mile is inadequate.

Witnesses who are employees of the Government and testify on behalf of the United States or in their official capacity receive such mileage allowances as the Administrator of the General Services Administration prescribes for such travel under 5 U.S.C. 5751. Pursuant to 5 U.S.C. 5704(a), these fees are to reflect current costs as determined by the Administrator and are not to exceed a statutory ceiling of 11 cents a mile for motorcycles, 20 cents a mile for automobiles, and 24 cents a mile for private aircraft. Currently, the Administrator has set travel allowances at the maximum rate for motorcycles and airplanes, and 17 cents a mile for automobiles.

The proposed legislation would place the disbursement of travel allowances for Federal witness who travel by private carrier under the authority of section 5704, as well.

Witnesses attending courts which are so far distant from their residences as to require overnight stays are presently limited to $16 a day for subsistence expenses by section 1821. This fixed allowance of $16 is clearly unrealistic in light of current food and lodging costs.

Since 1968 when Congress raised the subsistence allowance to its present level, the cost of "food away from home—restaurant meals" has risen over 50 percent, according to the U.S. Bureau of Labor Statistics, Department of Labor, "Handbook of Labor Statistics 318," reference edition 1975.

In addition, average lodging costs have increased from $12.27 per night in 1968—according to Laventhol, Krekstein, Horwath, and Horwath's "Hotel Operations: 1968 20" of 1968—to $19.66 per night in 1975, according to Laventhol and Horwath's "U.S. Lodging Industry: 1975 12" of 1975.

In lieu of the flat subsistence allowance that section 1821 provides, the proposed bill would entitle witnesses to daily allowances equal to those which Government employees receive for official travel. This legislative proposal would change the regular per diem for witnesses to $35 a day for travel within the continental United States, pursuant to 5 U.S.C. 5702(a)(1). Additionally, provision is made for reimbursement up to $50 a day in those areas which the Administrator of Gen-

eral Services has designated as high-cost areas under section 5702(c)(B).

As with the proposed changes in the computation of travel fees, this suggested alteration in the method of determining subsistence allowances would eliminate both the present inequities in compensation between witnesses and the need for frequent revision of witness fee statutes.

Section 3149 of title XVIII, United States Code, permits the detention of a witness whose testimony is material in a criminal proceeding, whose appearance it may be impracticable to secure by subpena, and who cannot comply with the conditions of release which 18 U.S.C. section 3146 permits a court to impose. Pursuant to section 1821, a detained witness receives an incarceration fee of $1 per day in addition to subsistence, during each day of confinement.

In a 1973 decision, *Hurtado* v. *United States*, the Supreme Court ruled that section 1821 entitles such a witness to an attendance fee for each day of confinement during which the pertinent trial or other proceeding is in session. Despite past attempts to keep other witness fees abreast of increasing costs, there has been on change in the $1 compensation for detained witnesses.

Section 2049 would amend section 1821 to provide that a witness, detained for want of security for his appearance, shall receive the daily attendance fee for each day of his incarceration. This method of payment would more adequately compensate detained witnesses for the inconvenience and hardship of detention and comply with the decision of the Supreme Court in *Hurtado*.

The Department has estimated that this proposal would require an increase of approximately $9,100,000 for fiscal year 1978. Our estimate is based on the following:

First, attendance fees would increase by 50 percent, which represents the percentage increase in the fee from $20 to $30.

Second, compensation for detained witnesses during noncourt days would increase from $1 to $30.

Third, subsistence payments would more than double, since the $35 regular per diem which Government employees now receive is more than twice the $16 which other witnesses currently receive.

Fourth, travel costs by private automobile, the principal mode of witness travel, would increase by 70 percent, since Government employees now receive an allowance of 17 cents per mile, while other witnesses only receive 10 cents per mile.

The third bill before your subcommittee, S. 2075, would increase the daily juror fee, revise the provisions governing travel and subsistence expenses of jurors, and provide jurors with protection from discharge or loss of status in their jobs because of their performance of Federal jury service. It is the view of the Department that this bill would result in improvement of the Federal jury system, and we support its adoption.

The juror fee increase would place the juror fee at the same level as that of the witness fee we support. It is appropriate that the two daily fees be the same and, for the reasons given earlier, $30 is, in our view, the proper level.

We have no objection to the $5 escalator clause, inasmuch as petit jurors serving over 30 days and grand jurors serving over 45 days are

rendering extraordinary service. We do, however, believe that it would be simpler and more equitable if the increases were automatic, rather than requiring judicial certification.

The travel and subsistence allowance provisions provide fair and reasonable levels of compensation. This is important to prevent undue financial burdens being incurred as a result of jury service.

The employment protection provisions represent a valuable addition to the law. There is presently no such provision, and employer retaliation against jurors is a real problem, although the true magnitude is not known. In the past, the Department has invoked the obstruction of justice and contempt provision of the law in dealing with this problem. This, however, has not proved to be adequate, and we believe that the proposed statute is needed.

I would like to comment on two specific provisions. We believe that the section providing counsel for jurors represents the right approach.

It has been suggested, however, that the Department of Justice should represent such jurors. This, we believe, could create an undesirable situation of a conflict-of-interest nature, since the potential lawyer for the juror, such as the Attorney General or his representatives, would also be representing the United States in the case the juror had been called upon to judge.

In addition, we believe that it is important to include the civil penalty provision as a part of the bill. It should be clear to an employer that the potential price for violating an employee's employment rights is high indeed.

There is a public interest in all citizens being available for jury service, and where that interest is interfered with, there should be public recourse available, in addition to protection for the individual juror.

We note that there are two additional bills pending before the subcommittee upon which you have requested our views.

The first, S. 2072, would amend the Jury Selection and Service Act of 1968, as amended, to make the excuse of prospective jurors from Federal jury service on the grounds of distance from the place of holding court contingent upon showing of hardship on an individual basis. Whether this bill should be enacted involves questions as to which we defer to the Administrative Office of the U.S. Courts.

Finally, S. 2074 would amend title 28 of the United States Code to provide in civil cases for juries of six persons, to amend the Jury Selection and Service Act with respect to the selection and qualification of jurors, and to extend the coverage of the Federal Employees Compensation Act to all jurors in U.S. district courts.

This bill is under active consideration by the Department at the present time, but we have not yet formalized our final position on the issues which it presents. We hope to conclude our study of S. 2074 shortly, and we will make our views known to the subcommittee in the near future.

This concludes my prepared remarks. I would be pleased to answer questions from members of the subcommittee.

Senator DeConcini. Thank you, Mr. Rooney.

Senator Wallop, do you have any questions?

Senator Wallop. I have one, Mr. Chairman.

With regard to the part of your testimony that relates to jurors' fees, and the $5 escalator clause, and where you suggest that that should be automatic, would that be automatic for the whole time, or just that period of time subsequent to 30 or 45 days?

Mr. ROONEY. The period of time subsequent.

Senator WALLOP. Thank you, Mr. Chairman.

Senator DECONCINI. Mr. Rooney, regarding the problems that the Department has had where employers have made threats, or actually fired people, do you have any statistics, or any reports, or anything that we could review in that area, or can you give an opinion as to the severity of this? It is obviously a severe problem when it happens to someone, but is it minor in the sense of your workload or complaints that Justice has?

Mr. ROONEY. We have not conducted any studies of this, Mr. Chairman. We are not prepared to say, because we have not, that it is as prevalent a problem as it might possibly be.

However, when it has happened, it has been a very real problem. As I indicated in my prepared remarks, we have not had any great success in using the obstruction-of-justice provisions. Therefore, we really strongly believe there ought to be some statutory provision.

Senator DECONCINI. When you say that there has not been any substantial success, you have filed obstruction-of-justice cases, I presume?

Mr. ROONEY. Yes, we have.

Senator DECONCINI. They have not succeeded in verdicts against the employers?

Mr. ROONEY. That is correct.

Senator DECONCINI. What other procedures are available, if any?

Mr. ROONEY. Contempt.

Senator DECONCINI. Have you attempted to use that method? That is, asking the court to hold them in contempt?

Mr. ROONEY. That would, of course, be invoked by the court, and it has been done at least once.

Senator DECONCINI. Do you attempt to call those flagrant cases to the court's attention?

Mr. ROONEY. Yes.

Senator DECONCINI. Do you leave it to their own resources?

Mr. ROONEY. As far as I know, Mr. Chairman, I am not aware of any instance where we have or have not. But generally, that is left to the court.

Senator DECONCINI. Do you use any other techniques, such as form letters to employers, or have you thought of any other very persuasive measures, or attempted to educate employers?

Mr. ROONEY. To my knowledge, Mr. Chairman, we have not.

Senator DECONCINI. In your statement, you indicated that the Department of Justice is actively considering the question of 6-person juries, and other aspects of S. 2074. When would you expect the Department's position to be available?

Mr. ROONEY. We hope, Mr. Chairman, to conclude our review of that in the next couple of weeks. We are shooting for 2 weeks.

Senator DECONCINI. Do you have any personal comments on this proposed reduction in the jury system?

Mr. ROONEY. No. sir.

Senator DECONCINI. How about the problem of multiple lists? Will that be forthcoming, also, with observations or opinions regarding multiple lists rather than the voter registration lists?

Mr. ROONEY. The Department has not yet addressed that aspect of the bill. However, we will include that.

Senator DECONCINI. Will that be included in your recommendations?

Mr. ROONEY. Yes.

Senator DECONCINI. Several of the bills before us today deal with an increase in fees for marshals, witnesses, and juries. Along the lines of these increases, there has been some discussion of the initial filing fee being increased from the present $15 level. Do you have any thoughts or suggestions on that, or does the Justice Department have anything under study?

Mr. ROONEY. I have no personal comments. To my knowledge, the Department has not addressed that at all to date, at least under this administration.

Senator DECONCINI. Would you care to consider that? I do not know if it is realistic to ask your Department to delve into it, but I would welcome the Department's views.

Mr. ROONEY. It would be an appropriate area, and I will talk to them about it.

Senator DECONCINI. Thank you.

Senator Wallop?

Senator WALLOP. I have a comment.

It scarcely seems worth while coming up here to give this kind of a comment and have no personal opinion on the number of bills that are in front of us. I did not gain very much by this.

Senator DECONCINI. I hope we will have a report in 2 weeks, and perhaps have a little better idea of what the Justice Department and the Attorney General feel on this. Their comments, as you can note, pertain to somewhat noncontroversial bills. We thank you, gentlemen.

[The Department of Justice report follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., December 14, 1977.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 2074, a bill "To provide for juries of six persons in civil cases, to amend the Jury Selection and Service Act of 1968, with respect to the selection and qualification of jurors, and to extend the coverage of the Federal Employees Compensation Act to all jurors in United States district courts."

With respect to Title I, establishing a requirement of six-person civil juries in federal district courts, existing law leaves the question of jury size to local court rule. The Department of Justice opposes enactment of Title I because we believe that present law is preferable to the proposed change.

In testimony before the Judiciary Subcommittee on Improvements in Judicial Machinery on September 26, 1977, the General Counsel of the Administrative Office of the United States Courts indicated that 82 of the 94 federal district courts presently utilize six-person civil juries by local rule. Thus, the economics and efficiencies of six-person juries are generally being realized now. While we do not know why the twelve districts that have retained twelve-person juries have chosen to do so, there are a number of factors that may have led to that decision. First, with juries larger than six, there is a greater likelihood of a fair cross-section of community viewpoints being represented and, particularly,

of minority group participation. In addition, in the initial deliberations of a jury, conclusions that are correct but not recognized initially by a majority of the jury will be more likely ultimately to prevail where such conclusion are held by a minority of several, rather than a minority of one. A larger jury is more likely to produce a minority of more than one.

Existing law allows individual districts to provide for juries larger than six, thereby permitting a particular court to determine that a larger jury better serves the needs of its community. We believe that this is a better approach than the one than the proposed change would produce.

Title II would create a presumption that jurors selected from voter lists represent a fair cross-section of the community. It would consequently require district courts to select jurors only from voter registration lists except where the court makes a finding that additional lists should be used because the voter lists do not represent a fair cross-section of the community. Existing law requires that other lists be used in addition if necessary to carry out the purposes of the Jury Selection and Service Act of 1968. The Department of Justice is opposed to the proposed amendment.

The evidence that voter registration lists do not provide for adequate representation of minority groups is strong. For example, in the 1974 election, 37.8 percent of the population as a whole was not on registration lists, but 45.1 percent of the black population and 65.1 percent of the Spanish origin population was unregistered. For a similar view, see American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Trial Courts, Standard 2.61 Juror Selection Procedure.

Further, we believe that juries should be representative not only of a cross-section of the community, but also that all citizens should, to the fullest extent possible, be made available for jury service. Since more than a third of all American citizens regrettably do not register to vote, we do not favor amending the law to tie juror selection more exclusively to voter registration lists.

Finally, while the amendment might simplify decisions relating to formulation of jury lists, it is doubtful that the proposal will, in fact, accomplish the apparent goal of reducing challenges to jury make-up. In fact, by making it more cumbersome to supplement voter lists, in marginal cases where the other lists might have been utilized but for the adoption of Title II, litigation over juror list constitution could increase.

The Department supports the changes in the law provided by Titles III, IV and V of the bill. Title III would revise the provision that permits jury service by a person convicted of a crime punishable by more than one year if his civil rights have been restored subsequent to a criminal conviction by pardon or amnesty. Under the amendment, jury service would be permitted for such a person whose civil rights had been restored by any legal process.

Title IV would bring the jury selection statutes into the age of the computer by clarifying that machine selection and summons preparation are allowable. It should be adopted.

Title V would extend coverage of the Federal Employee Compensation Act to jurors. Jurors would be entitled under the provision to compensation for disability or death resulting from personal injury sustained in the performance of their duties. This proposed change would assure fair compensation to jurors injured in the course of their jury service. We would suggest, however, that the proposal be modified to provide an offset provision similar to that contained in section 8192 of Title 5, United States Code. That section provides that in the case of law enforcement officers who are not federal employees, any benefits received under FECA for injuries received while on federal duty are reduced by the noncontributory amount received under state or local disability compensation laws. We also have under active consideration the issue of whether the GS–2 salary level is the appropriate measure of compensation for the award of FECA benefits under this bill. We are coordinating this inquiry with the Department of Labor (which administers FECA) and intend to respond to the Committee in the near future with respect to this matter.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

Our next witness will be Dr. Jay Schulman, founder and director of the national jury project's New York office.

We thank you very much for being in attendance today. We think you are most interested in S. 2074, so please proceed.

Do you swear that the testimony you are about to give to the subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SCHULMAN. I do.

STATEMENT OF JAY SCHULMAN, FOUNDER AND DIRECTOR, NATIONAL JURY PROJECT, NEW YORK OFFICE

Mr. SCHULMAN. Actually, we would like to address S. 2074, title I and title II, and S. 2075, as well. We would like to have your leave, sir, to submit a much longer statement for the record. What we would like to do, this morning, is to summarize some of our thoughts and observations.

Senator DECONCINI. That will be fine. Without objection, the material will be inserted at this point in the record.

[Statement prepared by Richard Lempert, J.D., Ph. D., regarding Senate bill 2074. Submitted jointly with Jay Schulman, Ph. D., follows:]

In this statement we address two issues raised by Senate Bill 2074: the issue of jury size and that of the peremptory challenge. Our starting point is with the ideals of our system of jury justice and the ways in which the operating system necessarily falls short of the ideals.

GENERAL CONSIDERATIONS

The ideal jury (a) is representative of the people living within the jurisdiction of the court, (b) is unbiased, (c) decides a case on the basis of the evidence presented, (d) evaluates in the light of the judge's instructions on the law and (e) in appropirate cases mitigates the rigidity of the law by reflecting in its verdict fundamental principles of justice and morality. With the exception of the last point most of those who have written about the jury would agree with this description of the ideal. Point (e) causes disagreement because of its obvious inconsistency with points (c) and (d); if an honest evaluation of the evidence and a good faith application of the law always led to just, moral results, arguments concerning the propriety of what has come to be called jury nullification would not arise. We will not comment on the matter of jury nullification except to note that our system has developed a peculiar compromise in this area—in most jurisdictions jurors have the de facto power to nullify the requirements of the law and evidence (or in civil cases to "season" the requirements of law with its own sense of justice) but they are not told they have it. Instead, we wish to note another tension and the compromises our system uses to cope with it. This is the inherent tension between the ideal of the representative jury and the demand that the jury be unbiased, competent in its evaluation of the evidence and comprehending in its application of judicial instructions.

Representatives drawn randomly from a community share the biases and prejudices that characterize members of that community. The prejudices may be irrelevant to the matter being litigated, they may be benign, or they may run counter to values that are deeply engrained in our legal system. Common prejudices include the belief that a police officer's word is better than the average citizen's and the belief that no police officer can be trusted. They range from the feeling that no tort judgment is excessive because an insurance company is paying to the feeling that only a chiseler would seek to collect for pain and suffering. Prejudices color the way in which jurors evaluate evidence, yet even unprejudiced jurors often are likely to be incapable of appreciating the true value of evidence presented. Finally, it is clear that jurors sometimes have

difficulty in understanding judicial instructions and applying them to the facts of a case.

Others have noted the tension between the demand that juries be competent unbiased factfinders and the requirement that juries be representative of the larger community. This observation is typically the empirical linchpin in arguments made by those who, at least in civil cases, would abolish the jury and transfer its factfinding functions to the judge. But those who argue this way make a fundamental mistake. They attribute the jury's deficiencies to the fact that individuals chosen arbitrarily from the community are sometimes uneducated, sometimes uncaring and typically legally naive. In fact, most of the drawbacks attributed to the democratic nature of the jury have little to do with the representativeness requirement. Instead they are attributable to a simpler, inescapable source: the human condition. People collect biases as they go through life. While they may differ in their ability to disregard them, there is probably no one whose observations will not at some time be affected by his biases. Even if such an individual existed his evaluation of evidence would still be far from perfect.

A substantial body of research now exists demonstrating ways in which people consistently misestimate the implications of information given them. Judges, alas, are also human. They can no more escape the dangers of biased perception and fallible information processing than the jurors over whom they preside. If judges have an advantage over jurors in their presumed understanding of the law, they are disadvantaged in that their public position subjects them to pressures that may systematically reinforce or create biases. Indeed, judges are at times elected or appointed in part because of the appeal of biases that are ideally irrelevant in the factfinding process. Furthermore, judges typically play an administrative as well as a judicial role. As administrators they are necessarily concerned with the efficent functioning of a judicial bureaucracy. Too often behavior which promotes bureaucratic efficiency is antithetical to our system's ideal of individualized justice. In such matters as criminal sentencing judicial behavior is apparently influenced by the legally irrelevant consideration of whether the court's time has been "wasted" by a full-fledged jury trial. In civil trials some judges reportedly engage in considerable "armtwisting" to promote out-of-court settlements. We note these factors not to condemn judges; they would not be human if they were not at some times influenced by the bureaucratic and other pressures brought to bear on them. But these pressures do mean that there is inherent value in an institution, such as jury trial, that guarantees the insertion of a non-bureaucratic element at a key point in the trial process.

What then is the attitude that Congress should take toward jury reform? It is not a romantic idealization of the jury; there is no reason to think that the jury today is a perfect factfinder or that it ever will be. But by the same token the jury should not be regarded as an imperfect substitute for a judge, an institution that will necessarily improve as it comes more closely to resemble or be influenced by one exalted individual learned in the law. In particular, the Congress should be skeptical of reforms that merely save money (given that the amount of money expended on jury trial is a mere pittance compared to expenditures on our total justice system and this sum is in turn but a minute portion of governmental budgets) and particularly suspicious of reforms whose primary virtue is that they ease the tasks of judges and court administrators. The continued vitality of the Sixth and Seventh Amendments should be accepted as a starting point. This means that jury trial will necessarily be with us in the foreseeable future. The issue is how may the institution be made more effective in promoting the valued goal of fair and accurate factfinding. The starting point for inquiry is with the apparent weaknesses of factfinding by average individuals.

JURY SIZE

We specified three possible deficiencies in lay factfinding: the biases may influence perceptions; the probative weight of evidence may be distorted, and instructions on the law may be misunderstood. These are all problems that are ameliorated by group decisionmaking. In groups, expressions of bias may be inhibited or properly dismissed as individuals with conflicting points of view call each other to account. Totally apart from bias, group factual judgments tend to be more accurate than those made by individuals. An individual is at all times left to his own devices while a group may receive contributions from many indi-

viduals. Where, for example, memory is important as in recalling the testimony of various witnesses, one individual may recall certain facts while another recalls others. Where a problem is inescapably ambiguous, error variance is reduced when individual judgments are averaged together. Where understanding is difficult, as with a judge's instructions, a lone decision maker is lost if he does not understand. A person in a group may benefit from the understanding of others. Groups, in short, are in many ways as strong as their strongest link.

These advantages of group decision making are more pronounced as group size increases, until the point where the contributions of new members are offset by increasing problems of coordination or morale. However, even before the point of negative returns each additional new member is likely to add somewhat less to the quality of group decision making than the person before him. The question facing the Congress is whether differences in the quality of decisions rendered by six and twelve member groups are likely to be so great that the quality of jury justice will be decreased by mandating the smaller number. Our feeling is that this is the case. In clear cases six and twelve member juries should decide similarly, although the occasional decision against the weight of the evidence will be more common with the smaller group. In close cases, decisions of larger juries, should, on the average, be better with respect to such core legal values as unbiased factfinding, thorough consideration of the evidence and consistency across similiar cases.

It can be shown statistically that minority viewpoints are substantially more likely to be represented in (more or less) randomly chosen groups of twelve than in similarly chosen groups of six. The greater heterogeneity of the larger group makes it a setting in which individual prejudices are more likely to cancel out and in which individuals with valuable specialized knowledge of particularly astute insights are more likely to be available. A further advantage enjoyed by larger juries is that they are more likely to render similar decisions in similar cases. Where individual judgments are averaged, as is often the case in civil litigation despite the official disrepute of quotient verdicts, averages taken across twelve individuals are likely to diverge less than average taken across six. Even where judgments are not averaged, groups of twelve are more likely to resemble each other than groups of six in that they more accurately reflect the population from which they are drawn.

In short, both statistical modeling and the existing research on small groups make it clear that proponents of six member juries cannot substatiate the claim that such juries are likely to be better decision makers than juries of twelve. Indeed, even the weaker burden of showing that the switch to smaller juries will not positively harm the quality of jury justice cannot be met. While proponents of larger juries cannot specify precisely the degree to which the decisions of twelve are likely to be better than those of six, a fair reading of the evidence indicates that the advantage generally lies with twelve, perhaps by a considerable margin. Thus, it is our strong recommendation that Congress not interfere with those federal district courts that have been able to resist the bureaucratic siren song of six member juries choosing to opt for the higher quality of delivered justice likely to be associated with juries of twelve. Indeed, our preference is a statute requiring all districts to allow litigants the option of a larger jury, at least in cases where substantial amounts of money are at stake or important values clash. The additional expense of larger juries is miniscule relative to the federal budget and slight relative to total judicial expenditures.

Some have asked, "If twelve jurors are better than six why aren't thirteen or fourteen jurors better than twelve?" This question is put forth as if it were a response to the arguments of those who favor the retention of the twleve member jury. It is not responsive. If fourteen jurors in fact perform better than twelve this fact supports rather than undercuts the conclusion that twelve jurors perform better than six. Those who write on jury size rarely address the issue of juries larger than twelve because the debate over jury size is for practical purposes constrained by political reality and today's political reality is that juries are going to be of no more than size twelve. Nonetheless, it is interesting to speculate about the desirability of juries with more than twelve members. Several points can be made. First, we do not know whether juries of sizes thirteen, fourteen, fifteen or higher might reach decisions of a higher quality than those reached by twelve member juries in some or all cases. Second, the value of additional jurors apparently increases at a decreasing rate. Thus, any increase in the quality of jury decision making that results from going, for example, from twelve jurors to fourteen is not likely to be as great as the increase brought about by

going from ten jurors to twelve. Finally, as we increase jury size much above twelve coordination and/or morale problems are likely to set in which will more than offset the incremental contributions of the new jury members. At what size this occurs, we cannot say. Give the experience with juries in this country, we are reasonably confident that these problems do not cause grave difficulty in juries of twelve.

PEREMPTORY CHALLENGES

A second proposed "reform" is reducing the number of allowed peremptory challenges in civil and criminal cases. Some who argue for fewer peremptory challenges view them as a device by which adroit attorneys can pack juries with those biased in their favor while others believe that peremtory challenges distort juries by making them less representative of the population from which their members are drawn. While we recognize that attorneys do on occasion eliminate people because of their leadership potential or education rather than because of perceived bias, we nonetheless believe that the first view is largely mistaken.

Given the limited number of peremptory challenges, their availability to both sides, and the fact that challenged jurors are replaced at random, the most an attorney can usually do is eliminate those jurors likely to be prejudiced against his or her client. Only in special circumstances where community views disproportionately favor one party or a case appears hopeless to begin with can an attorney afford the luxury of eliminating the unbiased. There is more substance to the second claim, but it by no means makes the case for reducing the number of peremptory challenges. Although maximizing the degree to which the jury represents the community may have value in itself, few would think this value more important than the maximization of the likelihood of fair factfinding. Some viewpoints found in the community should not be represented on juries. An obvious case is the viewpoint of one so closely related to a party that his decision is likely to be colored by that relationship. Another obvious example is the viewpoint of one so convinced before trial that a certain outcome is appropriate that he is unlikely to be swayed by the evidence.

The right to challenge jurors is essential because where values clash it is more important to have jurors who can be fair in their judgments than it is to have a jury that mimics the demographic or attitudinal composition of the community. Challenges are devices for eliminating from juries individuals whose prejudices are likely to interfere with their ability to be impartial triers of fact. The group of jurors who survive the challenge process may be less representative of the community from which they are drawn than the original group of unchallenged jurors, but they are more likely to render a judgment fairly responsive to the evidence in the case. The trade-off between representativeness and fairness strengthens rather than weakens the quality of jury justice.

Many individuals accept the above argument in the case of the challenge for cause, but do not believe it applies to the peremptory challenge. Those who make this distinction do not realize how the system of challenging for cause is often administered. While there are circumstances, such as a close family relationship to one of the parties, where a challenge for cause must be allowed, the system is generally one of great judicial discretion. Many judges are reluctant to exclude jurors for cause despite an obvious source of bias if the juror states that his decision will be unaffected by the apparent cause for concern. Appellate courts typically support such lower court decisions. For example, plaintiff's attorney in a suit brought against an insurance company might wish to challenge for cause a juror whose parents were agents for some other insurance company. If the juror states that these family ties will not influence his decision, a challenge for cause will be unavailable in many courts. The decision not to exclude for cause in these circumstances may be justifiable, but it is not justifiable on the ground that the juror can be trusted to disregard the obvious source of bias. A promise to put aside one's biases is inherently suspect because people are often unaware of how their biases affect their judgments. The promise is even more suspect when it is made in a setting where one might be embarrassed to admit that he could not be fair. If the promise is suspect, the quality of jury justice is likely to be enhanced by disregarding disclaimers of prejudice where any likely source of bias is revealed on voir dire.

However, this alternative has its disquieting aspects. People rarely ask to serve on juries and they surely do not ask to be publicly questioned in ways that cast doubt on their integrity. To dismiss for cause a juror who has asserted his

capacity for separating judgment from prejudices may be perceived by the one dismissed and by others as degrading or insulting. We should be reluctant to add this kind of burden to the other burdens of jury service. Furthermore, the likelihood that a person will be influenced by apparent sources of prejudice will not always be as clear as in the example of the preceding paragraph. Judicial intuitions about when an asserted capacity for unbiased judgment should override suspicions of bias almost surely will vary from judge to judge and individual judges might well be inconsistent over time. One situation poses almost insoluble difficulties for a system which relies on the challenge for cause to eliminate individuals whose prejudices would interfere with fair jury fact-finding. This is where a suspicion of bias is engendered not by some particular feature of the juror's biography or by some specific prejudice, but rather by a set of diffuse attitudes that characterize the juror's outlook on life. An individual low in tolerance of ambiguity and high in deference toward authority might be likely to approach a criminal defendant with a presumption of guilt rather than innocence. Yet we can hardly expect a judge to attend to all the character traits that might predict to biased judgments. We have even less reason to expect an appellate court to declare that they do predict as a matter of law.

If we relied on judges to exclude for cause all individuals likely to be incapable of fair judgment and if current practice is a guide, the error of failing to strike biased jurors would be more common than the error of striking the unbiased, but both should occur. The latter error should never be grounds for appeal since the struck juror would, in theory, be replaced by one equally unbiased. The former error, being defined by psychological rather than legal theory, would be very difficult for appellate courts to handle. Hence, trial judges would be likely to be given considerable discretion which, in practice, would be largely unreviewable. Thus attempts to eliminate juror bias by an expanded conception of what constitutes grounds for challenge might lead to a system which was in practice only slightly more effective than the current one.

The availability of peremptory challenges minimizes tensions inherent in our system for cause challenges. The primary virtue of the peremptory challenge is as a device for eliminating from the jury individuals whose capacity for impartial judgment is suspect, but not so suspect as to demand their exclusion as a matter of law. The preemptory challenge has the further virtue of saving face for jurors who have asserted a doubtful capacity to decide in unbiased fashion since these assertions are never rejected by the court in the way that they would be if a challenge for cause was sustained. Mistakes, no doubt, continue to be made, but they are the mistakes of the parties who suffer from them and not the mistakes of the court. Finally, the availability of peremptory challenges allow the courts to take what is, psychologically speaking, an unduly restrictive view of when potential jurors are likely to be impermissibly biased without substantially endangering the quality of jury justice as it would if prejudiced jurors not challengable for cause could not be removed peremptorily. By limiting the situations in which challenges for cause must be granted appellate courts minimize the chance of reversible error during the jury selection process.

There is no ideal number of peremptory challenges. Ideally their availability would vary with incidence of potentially biasing attitudes in the jury population. Generally speaking, people's biases are more likely to be activated in criminal than in civil matters and these biases are more likely to favor the prosecution than the defendant. This justifies the decision to grant more peremptory challenges in criminal cases than in civil actions and it would also justify a decision to grant criminal defendants more peremptory challenges than prosecutors. While the number of available peremptory challenges may be made to turn on whether an action is criminal or civil, it is impossible to specify in advance appropriate numbers of peremptory challenges for different types of civil litigation. Assuming some number is fixed for civil litigation flexibility may be achieved by judicial administration of the challenge for cause or by judicial discretion to increase the number of peremptory challenges available to one or both parties.

Where an action is likely to evoke popular prejudices, the judge should be more willing to allow challenges for cause, despite disclaimers of bias, than when an action appears less emotionally charged. If popular prejudice is directed largely against one size that side should have the easier time in excluding jurors for cause or should be allowed extra peremptory challenges. If one party

is to be awarded extra peremptory challenges, that party should bear a substantial burden of showing that prejudicial public opinion is widespread and deeply held. Whatever the judge's discretion with respect to challenges, the number of preemptory challenges should be sufficient to allow for the judge who is unduly rigid in his attitude toward for cause challenges, it should allow room to challenge individuals whose attitudes suggest bias even though their biographies or acknowledged prejudices do not and it should take into account the fact that individuals often have general biases regarding the kinds of people and organizations who are parties to typical civil actions. At the same time, it should not be so large as to allow an attorney too many opportunities to eliminate those who are likely to be unfavorable by reason of their abilities to rationally evaluate evidence rather than because of bias. We cannot specify what the appropriate number of peremptory challenges is in civil litigation, but we feel strongly that with twelve member juries three peremptory challenges are likely to be inadequate in many cases. Cutting the number of available challenges to two would be most unfortunate. Whatever the number allowed, we believe the parties should have the option of increasing the number of available peremptories by mutual agreement.

This statement offers no substantiation for the many empirical propositions that lie at the root of it. For substantiation of the argument with respect to jury size see: Richard Lempert, Uncovering Nondiscernible Differences: Empirical Research and The Jury-Size Cases, 73 Mich. L. Rev. 643 (1975) and the studies cited therein. For substantiation of the points regarding peremptory challenges see: Barbara Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545 (1975); Note, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 Stan. L. Rev. 1493 (1975); Dale Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965); and Virginia R. Boehm, Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to The Problem of Jury Bias, 1968 Wis. L. Rev. 734

UNCOVERING "NONDISCERNIBLE" DIFFERENCES: EMPIRICAL RESEARCH AND THE JURY-SIZE CASES

*Richard O. Lempert**

I. Reasons for Not Discerning Differences

In *Williams v. Florida*[1] the Supreme Court, relying on a "few experiments" that in the eyes of the majority indicated "no discernible difference" in the results reached by six- and twelve-member juries,[2] held that a decrease in the size of the criminal jury from twelve to six members was not inconsistent with the sixth amendment right to jury trial. In *Colgrove v. Battin*[3] the majority read four recent studies as providing "convincing empirical evidence"[4] confirming the conclusion in *Williams*, and so found a

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I would like to thank Dan Russell, who worked for me as a research assistant. He made particularly valuable contributions in helping me search the social-psychological literature on small groups and in programming the statistical analyses reported in this paper. My thinking about the problems related to jury size was stimulated by two excellent seminar papers written for me, one by David Kaye, a 1972 graduate of Yale Law School, and another by Jim Christman, a 1973 graduate of The University of Michigan Law School, and by a seminar paper prepared for Professor Angus Campbell by Stephen Hagen, a student at The University of Michigan Law School. I should also like to note what should be obvious to even the most casual reader, the great debt I owe to a man I have never met—Professor Hans Zeisel of The University of Chicago Law School. Although this paper in parts builds on a criticism of some of Professor Zeisel's work, my research, like the work of others interested in the American jury and the integrity of the jury system, has been significantly advanced by the many articles published by Professor Zeisel and by his important book, coauthored with Professor Kalven, *The American Jury*. Professor Zeisel was kind enough to read and comment on an earlier version of this paper, as were Professors Francis Allen, Shari Seidman Diamond, Joseph Sanders, and G. Joseph Vining. The paper has been strengthened by their comments.

1. 399 U.S. 78 (1970).

2. 399 U.S. at 101. The studies cited were Cronin, *Six-Member Juries in District Courts*, 2 Boston B.J. No. 4, at 27 (1958); Phillips, *A Jury of Six in All Cases*, 30 Conn. B.J. 354 (1956); Tamm, *The Five-Man Civil Jury, A Proposed Constitutional Amendment*, 51 Geo. L.J. 120 (1962); Wiehl, *The Six Man Jury*, 4 Gonzaga L. Rev. 35 (1968); *New Jersey Experiments with Six-Man Jury*, 9 Bull. of the Section of Jud. Admin. of the ABA (May 1966); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. Am. Jud. Soc. 136 (1958).

3. 413 U.S. 149 (1973).

4. 413 U.S. at 159-60 n.15. The four cited studies were Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Bermant & Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 Wash. L. Rev. 593 (1973); Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. Mich. J. L. Ref. 712 (1973); Note,

similar decrease in the size of the civil jury to be not inconsistent with the seventh amendment.[5] In both cases the Court considerably overstated the implications of the empirical evidence that it cited, and in both cases Professor Hans Zeisel, one of the country's leading academic advocates of empirical research into law-related problems[6] and preeminent among students of the American jury,[7] responded with telling criticism.

In his article responding to *Williams*, Zeisel shows that the "experiments" on which the Court relied are in no scientific sense experimental; rather they are speculative or impressionistic reports based on limited or, in one case, no experience with the six-member jury.[8] Zeisel is gentle with the Court; he never emphasizes the majority's extreme disingenuousness in citing these reports as experiments and in relying on them as evidence of "no discernible difference." Certainly, a careful reader of the cited studies would have appreciated their nonexperimental nature and their limited bearing on the issue of whether jury size affects jury verdicts.[9]

Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. MICH. J. L. REF. 671 (1973).

5. *Williams* was a state case, but the opinion appears to apply to the federal criminal jury as well. However, Justice Powell, not on the Court when *Williams* was decided, apparently would allow the states more leeway to vary traditional modes of jury trial than he would the federal government. *See* Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Powell, J., concurring in both *Johnson* and Apodaca v. Oregon, 406 U.S. 404 (1972)). If Justices Brennan and Douglas were to realize that many of the values that they saw threatened by allowing nonunanimous verdicts, *see* 406 U.S. at 380, 395 (dissenting opinions), also were undermined by diminishing the size of the jury, it is possible that the Court, if faced with the issue, would find that the sixth amendment continues to require twelve-member juries in federal criminal cases. *Colgrove* sustained federal district court rules providing for six-member juries in civil actions.

6. *See, e.g.*, H. ZEISEL, H. KALVEN & B. BUCHOLZ, DELAY IN THE COURT (1959); Zeisel, *Reflections on Experimental Techniques in the Law*, 2 J. LEGAL STUDIES 107 (1973); Zeisel, *Social Research on the Law: The Ideal and the Practical*, in LAW AND SOCIOLOGY 124 (W. Evan ed. 1962); Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960).

7. *See, e.g.*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966) [hereinafter THE AMERICAN JURY]; Zeisel, *The Jury and the Court Delay*, 328 ANNALS 46 (1960); Zeisel, *What Determines the Amount of Argument Per Juror?*, 28 AM. SOC. REV. 279 (1963).

8. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 713-15 (1971). For a student piece making some of the same arguments, see Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971).

9. This disingenousness, coupled with the mistaken way in which the Court reads findings from *The American Jury*, *supra* note 7, suggests that the majority simply assumed that jury size had no relation to jury verdicts and was searching for evidence to support this assumption. *See* Zeisel, *supra* note 8, at 719-20 (commenting on the Court's misreading of data from *The American Jury* in *Williams*, 399 U.S. at 101-02 n.49).

The response to *Colgrove*,[10] written with Shari Seidman Diamond, focuses on the four studies cited by the majority[11] as further support for the proposition that there is no discernible difference between the results reached by six- and twelve-member juries. Zeisel and Diamond demonstrate that significant flaws in the design of each study preclude any cautious observer from basing conclusions about differences between six- and twelve-member juries on the reported results.[12]

The article responding to *Williams* closes with a statistical analysis of the relationship between jury size, composition, and behavior. Zeisel demonstrates that, given certain plausible assumptions, a change in jury size from twelve to six members should influence

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10. Zeisel & Diamond, *"Convincing Empirical Evidence" on the Six-Member Jury*, 41 U. CHI. L. REV. 281 (1974).

11. *See* note 4 ***supra.***

12. *See* Zeisel & Diamond, *supra* note 10, at 283-90. The New Jersey and Washington studies were confounded by what have been called "selection effects." Both studies were based on trials in which the parties to a case determined jury size. Good experimental technique demands random assignment. If those cases in which the parties chose the twelve-member jury were systematically different from the cases in which they chose the six-member jury, differences associated with the different-sized juries might in fact be attributable to the differing nature of the cases heard. Similarly, findings of no difference between different-sized juries might occur where real differences associated with jury size are canceled by differences associated with the kinds of cases heard by the different-sized juries. It is clear that such a systematic difference existed in the New Jersey study—twelve-member juries were chosen when more money was at stake. INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 4, at 7. A similar difference in the Washington study is possible. *See* Zeisel & Diamond, *supra*, at 284. The Washington study is further limited, although Zeisel and Diamond do not point this out, because it concerned only workmen's compensation cases involving appeals from administrative decisions under an unusual procedure whereby the attorneys read the record of the administrative hearing to the jury. Bermant & Coppock, *supra* note 4, at 594. Given these circumstances, the results of even a well-designed study could not be safely generalized to all civil trials.

The Michigan Before-and-After Study, Note, 6 U. MICH. J. L. REF. 671, *supra* note 4, suffers from unfortunate "historical" effects. At about the time when Michigan switched from twelve- to six-member juries in civil cases, the state also introduced a mediation board procedure and began to allow discovery of insurance policy limits. These changes had a substantial impact on the incidence of pre-trial settlements, so that the cases heard by the six-member juries were not comparable to those heard by the larger panels. *See* Zeisel & Diamond, *supra*, at 288-89.

The Michigan Laboratory Experiment, Note, 6 U. MICH. J. L. REF. 712, *supra* note 4, also suffers from a number of defects that prevent one from accepting its findings as evidence that there is no difference in the results reached by six- and twelve-member juries. Chief among these are the small number of juries studied—eight of each size—and the fact that the particular case chosen impressed most jurors as favoring the defendant. *See* Zeisel & Diamond, *supra*, at 286-87. As discussed below, *see* text at notes 19-37 *infra*, a strong case for either party masks any effects of jury size. For a fuller critique of the Michigan Laboratory Experiment, see Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J. L. REF. 520 (1974).

For a discussion of a variety of factors that often must be controlled for in legal-impact studies, see Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 LAW & SOC. REV. 111 (1966).

jury verdicts.[13] The article criticizing the *Colgrove* studies suggests ways in which jury research ought to be conducted to test for size effects.[14] Taken together, the two articles imply that if the *Colgrove* studies did not have the methodological weaknesses for which they are criticized, verdict differences associated with jury size would be revealed. It is this implication that I wish to dispute in the first section of this article. With one possible exception, the likely effect of conducting methodologically more sophisticated versions of the *Colgrove* studies is the generation of further "convincing empirical evidence" to support the Court's position. This is so even if there are situations where jurysize undoubtedly affects jury verdicts.

A. *Problems of Jury-Size Research*

My point is not that verdict differences associated with jury size cannot be revealed through careful empirical investigation. Indeed, at several places in this article I will suggest research strategies likely to reveal such differences.[15] Rather, it is that typical strategies of legal-impact research, such as those utilized in the *Colgrove* real-world studies,[16] are unlikely to uncover differences associated with jury size however well they control for those plausible rival hypotheses that form the usual threats to the validity of impact research.[17] The reason lies in the unamenability of the jury-size problem to the usual techniques of aggregate data analysis.

The difficulties of the real-world approach are best illustrated if we look at the careful research designs that Zeisel and Diamond present in the latter part of their *Colgrove* article. Their "ideal" design would require a jurisdiction in which six-member juries were optional.[18] During the experimental period, cases in that jurisdiction would be tried simultaneously before two juries, one of six and one of twelve members. Although the court and the attorneys would know which jury would render the binding verdict, the two juries would deliberate without this knowledge. Effects of jury size presumably would be assessed by comparing the verdicts reached. Disagreement in a substantial proportion of the verdicts rendered in

13. Zeisel, *supra* note 8, at 715-20.

14. Zeisel & Diamond, *supra* note 10, at 291-92.

15. *See* Part III *infra*.

16. By "real-world studies" I mean studies of actual juries deciding real cases. These would include all of the studies discussed in *Colgrove* except the Michigan *Laboratory Experiment*, Note, 6 U. MICH. J. L. REF. 712, *supra* note 4.

17. For a discussion of common rival hypotheses, see Lempert, *supra* note 12.

18. *See* Zeisel & Diamond, *supra* note 10, at 291.

each case would be evidence that size effects existed. This conclusion would be strengthened if the differences were directional, since random factors could explain some nondirectional disagreement. If, on the other hand, the two juries disagreed in only a small number of cases, one would not be inclined to attribute the difference in verdicts to jury size.

In the abstract, this design and analytical framework might seem ideal. It has the particular virtue of revealing verdict differences on a case-by-case basis.[19] However, it holds a major trap for the unwary researcher: In any actual study, data analysis is likely to proceed on the implicit assumption that each trial provides an occasion on which any existing jury-size effects can, with a certain *constant* probability, be expected to appear. If, for example, in thirty out of one hundred trials the simultaneous verdicts were different, the researcher probably would conclude that there were substantial jury-size effects. If, on the other hand, differences arose in only five out of one hundred pairs of verdicts, the conclusion probably would be that jury-size effects were minimal.[20] But the probability of divergent verdicts in any particular case may be close to zero. A five per cent disagreement rate may reflect disagreement in all or a substantial percentage of those cases where jury size *reasonably* could be expected to influence jury verdicts.

B. *Most Cases Are Clear*

One may test this last point by attempting to estimate the fraction of cases in which jury size can be expected to have a reasonable probability of affecting the verdict. The best empirical starting point for making such an estimation is Kalven and Zeisel's *The American Jury*. In this book the authors perform a radical version of the experiment that Zeisel and Diamond propose. Instead of comparing the verdicts reached by juries of twelve with those reached by juries of six, they compare the verdicts of juries of twelve with those of "juries" of one, the judge. The difference between judges and twelve-member juries in socioeconomic status, legal sophistication, role conceptions, and cognitive processes of evidence evaluation are likely to exceed substantially the differences between six- and twelve-member juries with respect to these factors. Thus, one may

19. *See* text at notes 42-46 *infra*.

20. This difference might be better evaluated if one changed the experiment so that *two* juries of each size heard each trial. This would allow one to compare explicitly the amount of disagreement when different-sized juries judge the same cases with the amount of disagreement attributable to random differences among juries of the same size.

take the percentage of verdict agreement between judges and twelve-member juries as a minimum estimate of the percentage of cases in which jury-size effects could be expected to have virtually no influence on the ultimate verdict. In *The American Jury* the reported level of agreement is about seventy per cent.[21] If this analysis is accurate, different verdicts by six- and twelve-member juries in ten per cent of the Zeisel and Diamond experimental trials would reflect disagreement in thirty-three per cent of the cases in which disagreement was a realistic possibility. The former figure might strike some as minimal evidence of a size effect, while the latter figure would lead many to conclude that powerful size effects existed. The same difference might be reflected in formal determinations of statistical significance.

In fact, 30 per cent is probably far too high an estimate of the percentage of cases in which jury size could reasonably be expected to influence jury verdicts. The detailed data analysis in *The American Jury* provides a basis for a more refined estimate, although any final figure is necessarily imprecise.[22] Kalven and Zeisel begin their analysis with a total of 3576 cases.[23] In 1063 instances the judge and jury disagreed.[24] This constitutes 29.7 per cent of the sample cases and is a first estimate of the maximum number of cases in which jury-size effects might foster divergent verdicts. One may refine this estimate by eliminating those cases of disagreement in which size effects are very unlikely or by determining the percentage of cases in which the *possibility* of jury-size effects must be acknowledged.

Kalven and Zeisel report that the jury hangs in 197 cases, or 5.5 per cent of the total sample.[25] Jury size is likely to affect the probability that a jury will hang,[26] so these may be treated as cases in which jury size potentially affects the ultimate verdict.[27] In 65

21. THE AMERICAN JURY, *supra* note 7, at 109. This figure excludes cases in which the jury hangs as well as cases in which judge and jury disagree on a final verdict. Kalven and Zeisel deal only with criminal cases. The analysis that follows is limited by this restriction as well as by any methodological weaknesses that inhere in their study.

22. Any appearance of precision in a final estimate of the percentage of cases in which jury-size effects may be manifested is false. The estimate reflects any imprecision in the data presented in *The American Jury*, and it is weakened by the fact that those data are not presented in such a way as to facilitate this reanalysis. Particular problems are presented by the fact that in many cases more than one reason is given for judge-jury disagreement.

23. THE AMERICAN JURY, *supra* note 7, at 47.

24. *Id.* at 109, Table 23.

25. *Id.* at 110, Table 24.

26. *See* Zeisel, *supra* note 8, at 720 (citing data from Florida trials that suggest that six-member juries hang about half as often as twelve-member juries).

27. Treating all hung juries as cases in which one might expect a difference attribut-

additional cases, or 1.8 per cent of the total sample, Kalven and Zeisel find no reason for judge-jury disagreement.[28] Since these might be cases in which jury size could affect the verdict, the conservative procedure is to count them with the hung-jury cases for a minimum estimate of 7.3 per cent. This leaves 801 cases, or 22.4 per cent of the total, to be explained. In all but 7 of these cases disagreement is attributed in whole or in part to jury sentiments about the defendant, jury sentiments about the law, or evidentiary factors.[29] One subcategory under evidence, amounting to 2.1 per cent of the sample, is attributed to random or unknown factors.[30] Since these could be factors that differentially affect the verdicts of different-sized juries, these cases raise the minimum estimate to 9.4 per cent, leaving 20.3 per cent of the total sample unexplained.

The remaining subcategories under evidence and the categories involving jury sentiment all appear to reflect differences between the attitudes that jury members and judges bring to cases.[31]

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able to jury size is a conservative procedure, that is, it leads to an overestimate of the percentage of cases in which one might expect jury-size effects to be manifested. Some cases are so close, confused, or divisive that one would expect six- as well as twelve-member juries to hang.

28. The American Jury, *supra* note 7, at 110-11, Tables 24, 26. There are actually 101 cases where Kalven and Zeisel cannot explain reported disagreement, but 36 of these involve hung juries and so have been already counted.

29. The 7 exceptions are cases in which disagreement is attributed solely to facts only the judge knew or to disparity of counsel. It would appear that these factors would not interact with jury size, so these cases might be subtracted from the ceiling figure. However, it is conservative to conclude that all of these cases resulted in hung juries and thus to make no correction. In 123 cases involving jury sentiment or evidentiary factors there is disparity of counsel or facts only the judge knew. *Id.* at 113, Table 28. Since there is no reason to expect these factors to affect different-sized juries in different ways, there is no reason to single them out for analytical purposes.

30. *Id.* at 390, Table 59. In calculating this percentage a correction had to be made so that hung juries would not be counted twice. For this purpose the weighted figures presented in *id.* at 456, Table 120, were used. First, 7 cases were subtracted from the total number of cases, and the categories of "facts only the judge knew" and "disparity of counsel" were eliminated. *See* note 29 *supra*. Then the percentages attributed to the remaining categories were adjusted so they would total 100 per cent. This resulted in 74.7 per cent or 115 of 154 remaining hung juries being attributed to "evidence factors." In the absence of further information it was assumed that these hung jury cases were distributed proportionately across the subcategories of the "evidence factors" presented. These hung-jury cases were subtracted from the total number of "evidence factor" cases, leaving 638 cases. The proportion of evidence disagreements attributed to random or unknown factors among these cases equaled 77 cases, or 2.1 per cent of the total sample.

31. This appears obvious where judge-jury differences turn on the jury's sentiments about the law or the defendant. It is less obvious where disagreement is attributed to evidence factors, because here the cognitive differences between individual and group evaluations might be expected to lead to different verdicts totally apart from any attitudinal differences. In fact, however, with the exception of the "random" subcategory discussed in the text, all of the divergent verdicts that Kalven and Zeisel attribute to evidence factors reflect attitudinal differences between judge and jury rather than

Differences in verdicts of different-sized juries in these circumstances are unlikely unless the selection of six jurors results in a panel with a substantially different array of attitudes than that found in a jury of twelve. The problem is to estimate the proportion of cases in which the characteristic attitudes of different-sized juries will be so different that divergent outcomes are likely. One generally reasonable behavioral assumption makes this problem statistically manageable: In those situations in which jury verdicts reflect juror attitudes, the final verdict will reflect the attitudes held by an initial majority of the jury.[32] This assumption implies that in the remaining cases of judge-jury disagreement panels were drawn in such a way that seven or more members held attitudes toward the crime, the defendant, or the fact-finding process that the judge did not share or considered inappropriate.[33] Accordingly, the verdict of a six-member jury will diverge from that of a larger jury if four or more panel members do not share key attitudes held by seven members of the twelve-member panel. Thus, the problem as refined is as follows: Assume that a twelve-member jury has been drawn and that seven or more of its members hold attitude *X*. If one dismisses

cognitive differences. In 56 per cent of the evidence disagreements, the closeness of the evidence gave the jury a sense that it was at liberty to indulge sentiments about the law or the defendant that might otherwise have been inappropriate. In 21 per cent of these cases juries apparently saw witnesses, particularly witnesses without records, as much more credible than did more experienced judges. In 11 per cent of these judge-jury disagreements, the jury apparently set a higher standard of reasonable doubt than did the judge. *Id.* at 390, Table 59. In all of these situations it appears that the difference between judge and jury was influenced more by the relatively set attitudes that jurors brought to their deliberations than by differences in the way in which individuals and groups evaluate facts.

32. This assumption appears to be a reasonable description of how a jury typically behaves. Kalven and Zeisel report on the basis of juror interviews that where the initial ballot contains seven or more votes of "guilty," a final verdict of "guilty" is rendered 90 per cent of the time, a result of "not guilty" is reached about 4 per cent of the time, and the jury hangs in the remaining 6 per cent of the cases. Where the initial majority votes "not guilty," a final verdict of "not guilty" is rendered 94 per cent of the time, a verdict of "guilty" 1 per cent of the time, and the jury hangs 4 per cent of the time. *Id.* at 488, Table 139 (combining the first and second and fourth and fifth columns). One problem with this analysis is that the first ballot may not occur until after some discussion. However, Broeder, commenting on the same study, says that in most cases the ballot was taken immediately. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 747 (1958). *See* Note, *supra* note 8, at 542-45. Working with real jurors, Simon reports that in only 9 per cent of all cases and 11 per cent of cases reaching a consensus did a jury decide against an initial majority. R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 117 (1967). In similar experiments, Hawkins reports that in only 15 per cent of all cases did the jury hold against an initial majority. C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations, August 17, 1960 (unpublished doctoral dissertation in University of Chicago Library).

33. Some judges felt that the jury's role entitled them to consider certain factors that a judge should not. THE AMERICAN JURY, *supra* note 7, at 450, Table 1B.

that jury and draws a jury of six members from the same population, what is the probability that four or more members of the smaller jury will hold attitude *X*? The best estimate is about 77 per cent;[34] thus, where a jury's decision may be traced to the attitudes

34. For the solution of this problem I am indebted to my research assistant, Dan Russell, and to the consulting services of The University of Michigan's Statistical Laboratory.

Take a population of characteristic *X* of unknown proportion, p, such that $0 \leq p \leq 1$. Because p is unknown, assume it may fall with equal probability anywhere between 0 and 1 (In other words, we assume a uniform distribution on p, $f(p) = 1$. If we had some knowledge of p, we could assume a beta distribution for p that approximated our knowledge of p.)

Let B = the event that 7 or more persons out of a sample of 12 have characteristic *X*.

Let A = the event that 4 or more persons out of a sample of 6 have characteristic *X*.

Assume a large enough population that one can use a binomial approximation (or assume sampling with replacement). The conditional probability of A given B is expressed as follows:

$$\text{Prob. } (A|B) = \frac{\text{Prob. } (A\&B)}{\text{Prob. } (B)}.$$

To find Prob. (B) and Prob. $(A\&B)$ Bayesean methods can be used, since both probabilities are dependent on p, which is unknown.

Let $k_1(b)$ be the probability density function (pdf) for the 12-member sample, which we want to find to determine Prob. (B).

$g(b|p)$ is the conditional pdf of the 12-member sample, given p.

$g(b|p) = \binom{12}{b} p^b(1-p)^{12-b}$.

$k(p,b)$ is the joint pdf for p and b.

Thus, $k(p,b) = g(b|p)f(p)$ $\left[\text{since } g(b|p) = \dfrac{k(p,b)}{f(p)}\right]$.

$k_1(b)$ is the marginal pdf of b, which is given by $k_1(b) = \int_0^1 g(b|p)f(p)dp$.

Hence, if n is the required number of successes with respect to B, and m is the required number of successes with respect to A, Prob. $(B) = k_1(B) =$

$$\int_0^1 \sum_{n=7}^{12} \binom{12}{n} p^n(1-p)^{12-n} f(p)dp.$$

Similarly,

$$\text{Prob. } (A\&B) \int_0^1 \left[\sum_{m=4}^{6} \binom{6}{m} p^m(1-p)^{6-m}\right]\left[\sum_{n=7}^{12} \binom{12}{n} p^n(1-p)^{12-n}\right] f(p)dp.$$

Since we let $f(p) = 1$, we have $\text{Prob. } (A|B) = \dfrac{\text{Prob. } (A\&B)}{\text{Prob. } (B)} =$

$$\frac{\int_0^1 \left[\sum_{m=4}^{6} \binom{6}{m} p^m(1-p)^{6-m}\right]\left[\sum_{n=7}^{12} \binom{12}{n} p^n(1-p)^{12-n}\right] dp}{\int_0^1 \sum_{n=7}^{12} \binom{12}{n} p^n(1-p)^{12-n} dp}$$

$$= .7692.$$

with which its members view a problem, the verdict of a six-member jury drawn randomly from a population will differ from the verdict rendered by a twelve-member jury drawn from the same population about 23 per cent of the time.[35] Adding these cases of expected divergency (23 per cent of the 20.3 per cent of cases in which judge-jury disagreement was attributable to additudinal differences, or 4.7 per cent of the total sample) to the previous minimum estimate of 9.4 per cent produces a final estimate of 14.1 per cent as the proportion of cases in which jury size has a reasonable probability of affecting jury verdicts.

This final estimate explains why real-world research, even research as carefully designed as Zeisel and Diamond's "ideal" experiment, is likely to lend apparent support to the Supreme Court's conclusion that there is no discernible difference in the verdicts rendered by different-sized juries. There are simply too few cases in which it is reasonable to suppose that size effects will be manifested in divergent verdicts. If, for example, size affects verdicts in one third of the cases where such effects appear possible, the aggregate data collected in a Zeisel and Diamond ideal experiment would reveal fewer than five divergencies in every hundred trials.[36] Since some divergent verdicts might be expected to occur by chance, such a low figure would lead most to conclude too hastily that the *Williams* decision was right and that jury size has little or no impact on jury verdicts.[37]

See generally A. Hogg & A. Craig, Introduction to Mathematical Statistics, 61, 63, 208 (1970)

35. It should be noted that much of this difference in expected verdicts is not due to differences in jury size. Rather, it is due to the fact that two random samples have been drawn from the same population. If, for example, C were the event that 7 or more persons out of a second independent sample of size 12 would have characteristic X, then

$$p(C|B) = .8358.$$

36. Size effects would not be anticipated in all, or indeed most, of those cases in which the preceding analysis suggests they are possible. Many of the cases included in the 14.1 per cent estimate were included simply because lack of information meant that the possibility of a size effect could not be ruled out. In addition, while size can be expected to affect the rate of jury hanging, many cases in which juries hang may reflect the closeness of the case rather than size-related aspects of jury dynamics. Including all of the hung-jury cases in the 14.1 per cent figure was therefore extremely conservative. *See* note 27 *supra*.

37. It could be argued that, even if the absolute number of divergent verdicts was small, the sophisticated researcher could spot trends reasonably attributable to jury size. For example, if there were 10 divergent verdicts out of 140 trials and 8 of these were cases in which the twelve-member jury hung while the six-member jury reached a verdict, one might conclude that twelve-member juries were more likely to hang than six-member juries. There are two problems with this argument. First, the

C. *Selection Effects and Misleading Aggregates*

As an alternative to their ideal design, Zeisel and Diamond describe a "next best" design that in their view approximates a

researcher might still conclude that the difference is so small in magnitude as to be unimportant or show only weak size effects. Second, there appears to be no reason to expect size effects to manifest this amount of directionality. In some cases size effects might lead one jury to favor the plaintiff, in some they might lead it to favor the defendant, and in some they might lead it to reach a verdict where the other jury hangs. Of course, the possibility of spotting trends associated with jury size increases with the number of trials (and, hence, the number of divergent verdicts) examined. If a sufficiently large number of cases were examined, some of the objections that I have made to Zeisel and Diamond's ideal experiment would be weakened. However, given the expense involved in providing two juries for all cases, the desire of researchers to finish their work in a reasonably short time, and general expectations about what can be proved with relatively small samples, I would guess that reports of an "ideal design" experiment would be based on between 100 and 300 trials.

Professors Zeisel and Diamond suggest that this problem can be dealt with by the following "easily drawn, but difficult to implement" modification of their ideal design:

	Judge's opinion of case			
	Clear for:		Not clear, leaning toward:	
	Acquittal	Conviction	Acquittal	Conviction
Percentage of six-member jury verdicts agreeing with judge				
Percentage of twelve-member jury verdicts agreeing with judge				

Letter from Hans Zeisel to the author, November 4, 1974 [hereinafter Letter]. This modification does separate those cases in which the evidence is so clear that size effects are unlikely to be reflected in verdict differences. However, it raises the practical problems of securing judicial cooperation and spending enough time and money to acquire an adequate sample of "not clear" cases.

Ironically, the analysis in the text suggests that the Court may have been more justified in relying upon the nonexperiments cited in *Williams* than it would have been in relying upon apparently well-designed replications of the real-world studies cited in *Colgrove*. At least some of the studies noted in *Williams* were based upon the intuitions of experienced observers that there were no differences in the results reached by six- and twelve-member juries. These observers did not systematically count observations; they reported a *gestalt*, a general perception that a group of cases tried to six-member juries produced results similar to those that would have been expected from an analogous group of cases tried to twelve-member juries. Had there been even one case in which an observer felt that twelve would have decided differently than six, the conflict with the over-all *gestalt* might well have suggested further investigation. The typical "real-world" researcher, however, will examine only those aspects of the case that he has chosen to measure. At the end there will be only numerical differences of a greater or lesser magnitude; there is unlikely to be any detailed appreciation of the processes that produced these differences. If the differences are small, the researcher is likely to be very wary in attributing them to jury size.

I do not mean to suggest that the Court in *Williams* was on particularly solid ground in relying on impressionistic data. All of the cited reports apparently were written by advocates of the six-member jury, and the advocate is often blind to facts that contravene his position. To the extent that one can rely on soft, uncontrolled data, the New Jersey study provides the most important evidence: Lawyers in New Jersey disproportionately chose the twelve- rather than the six-member jury when larger amounts of money were at stake. *See* note 12 *supra*.

controlled experiment by randomly assigning cases to six- and twelve-member juries.[38] It seems likely that research will follow the "next best" rather than the ideal design, because the former, by avoiding duplicate juries, promises to be both less expensive and more consistent with ordinary court procedure than its ideal counterpart.[39]

The next best design requires a jurisdiction in which jury size is optional. Attorneys in such a jurisdiction would express a preference for six- or twelve-member juries. If the attorney had no preference or preferred the smaller jury only because of the lower jury fee,[40] the case would be assigned to a panel of either twelve or six members by some random "lottery."[41] Presumably one would compare the verdicts of the twelve-member panels with those of the six-member panels to determine any size effect. Although this type of design might be appropriate for some legal-impact research, it has flaws not shared by the ideal design that further increase the likelihood that experimentation will reveal no association between jury size and jury verdicts.

The first flaw is that only cases in which both attorneys are indifferent to jury size will be examined. If attorneys generally have any intuitive appreciation of situations in which jury size might affect verdicts, the proportion of experimental trials with a reasonable probability of size effects will be even smaller than was the case with the ideal experiment. Indeed, the experiment might prove impossible in some circumstances. If in criminal cases defendants' attorneys regard hung juries as victories, one might expect them always to insist on twelve-member juries.

The second and more basic flaw of this next best design turns on the fact that the data will have to be aggregated for analytical purposes.[42] If, for example, the six-member jury trials result in forty per cent defendants' verdicts while the twelve-member trials result in sixty per cent defendants' verdicts, the experimenter presumably

38. Zeisel & Diamond, *supra* note 10, at 291.

39. *But see* Zeisel, 2 J. LEGAL STUDIES 107, *supra* note 6, at 123-24, for an example of court cooperation with a research design similar to Zeisel and Diamond's ideal design. The major difference is that the "mock" juries were labeled and seated in the spectator section of the courtroom. In the "ideal design" the mock jury would be unlabeled and presumably would sit with the trial jury.

40. All experimental litigants would pay only the six-member jury fee regardless of the size jury assigned. Zeisel & Diamond, *supra* note 10, at 291.

41. *Id.*

42. This flaw is more basic because it means that even if a court—perhaps in a jurisdiction where six-member juries have been required—randomly assigned cases to six- and twelve-member juries, size effects would be less likely to be revealed than with the ideal experiment.

would conclude that a size effect exists. If, on the other hand, both sets of trials resulted in forty-five per cent defendants' verdicts, the likely conclusion would be that there was no size effect. Yet the latter finding would disguise a twenty per cent disagreement rate between the two types of juries if the twelve-member panels decide ten per cent of the cases for the defendant when the six-member panels would have found for the plaintiff and vice versa. In other words, to the extent that size effects are not directional, differences between the verdicts of six- and twelve-member juries will, in the aggregate, cancel out.[43] Such nondirectionality appears particularly likely in civil litigation. Kalven and Zeisel point out that in the civil cases they have studied, the judge finds for the plaintiff fifty-seven per cent of the time and the jury finds for the plaintiff fifty-nine per cent of the time, hardly a great difference.[44] But an examination of case-by-case statistics reveals a twenty-two per cent rate of judge-jury disagreement.[45] Zeisel and Diamond's next best design would show only the two per cent disagreement rate; their ideal design would report twenty-two per cent disagreement. The flaws inherent in the next best design appear so severe that the results of such research can never substantially support the proposition that jury size has no effect on jury verdicts.[46]

D. *Testing Statistical Significance*

Totally apart from the design used, one characteristic of most empirical analysis enhances the probability that research will fail to discern actual differences in verdicts rendered by different-sized juries. This feature is the routine reliance on significance tests with conventional levels of statistical significance to determine whether

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43. This cancellation effect would not be expected with respect to certain statistics, such as the percentage of hung juries and the variance of the amounts of damages awarded in civil cases. *See* text at notes 184-86 *infra*. Hence these statistics might be used to measure size effects in a "next best design" experiment. I do not feel, however, that the possibility of using such statistics renders the next best design a viable form of research. Differences in the percentage of hung juries, particularly in civil cases, are likely to be quite small. The courts and other less scientifically sophisticated "consumers" of jury-size research are likely to pay more attention to differences in the direction of jury verdicts and in the average amount of damage awards (for which no difference is expected) than they are to the less familiar statistic, the variance.

44. The American Jury, *supra* note 7 at 63, Table 16.

45. *Id.*

46. One might conclude on the basis of next best design research showing no association between jury size and party verdicts that in the long run reducing the size of the jury does not systematically favor one party over the other. However, unless one knows the situations in which jury size affects jury verdicts, the finding that there is no systematic jury-size bias does not mean that one should be indifferent to the question of jury size. *See* Part II *infra*.

differences deserve to be treated as discernible. To understand the problem one must understand some basic characteristics of significance tests.

Statisticians distinguish two types of errors that one may make in evaluating hypotheses.[47] "Type I" error is the mistake of rejecting a true hypothesis; "type II" error is the mistake of failing to reject a false hypothesis. In a typical jury-size experiment the researcher tests the "null hypothesis"[48] that jury size as an independent variable has no effect on jury verdicts as a dependent variable. A type I error would be to conclude that jury size affects jury verdicts when in fact it does not; a type II error would be to conclude that jury size does not affect jury verdicts when in fact it does.

Empirical research almost always reveals some association between the values of independent and dependent variables. A common research problem is to determine whether observed association reflects a possible causal relationship between the two variables. Tests of significance are designed to deal with one recurrent situation where association between two variables may be observed in the absence of any relationship of interest, that is, where the association results from chance.

An example may clarify the problem. Consider the researcher who wishes to examine the relationship between jury size and the frequency of hung juries, and who has access to records of thousands of cases, some of which were tried to twelve-member juries and some of which were tried to six-member juries. Assume that the researcher cannot afford to collect data on all of the cases in the files. Instead, he decides to start with the first case in the file and examine every fifth case thereafter. If at the end of this investigation he finds that five per cent of the twelve-member juries were hung compared to three per cent of the six-member juries, he may nonetheless be reluctant to conclude that twelve-member juries hang more frequently than six-member juries. It is possible that his results simply reflect the luck of the draw. For no particular reason, twelve-member jury trials ending in hung verdicts might have been disproportionately represented in the cases he sampled. Had he chosen other cases from the file, he might have found that five per cent of the six-member juries were hung as compared to three per cent of the twelve-member juries and, had he examined every trial, he might have found that four per cent of all juries regardless of size were

47. *See, e.g.*, H. Blalock, Social Statistics 92-96 (1960).

48. A null hypothesis generally is the hypothesis that there is no association between two variables.

unable to reach verdicts. How is he to know if the results from the cases he did examine are representative of the entire group? How is he to know whether a conclusion that jury size affects propensity to hang is justified? Significance tests aid in solving this problem[49] by indicating the probability that the selected cases would show an association as large as the one observed if there was no association in the larger population from which the sample was drawn. If such tests revealed that the difference was significant at the .05 level, the researcher would be reasonably confident that the observed association was not due to chance. Only one out of twenty times would his random selection procedures lead him to find a difference as large as the one he observed if there was no association between size and hanging among all of the cases in the file. A significance level of .01 would indicate that only one out of one hundred random samples would reveal a difference as large as the observed difference if there was no association in the population from which the sample was drawn.

These significance tests measure the probability of type I error—the probability of rejecting a true null hypothesis.[50] In the above example in which the significance level associated with a two per cent difference was .05, the researcher would reject the null hypothesis; he would decide that jury size was associated with rates of hanging, knowing that the odds were only one in twenty that he was being fooled by chance.

Knowing these odds presents the researcher with another problem. Should he proclaim or publish his results? Is a ninety-five per cent probability that one's results are not due to chance sufficient to justify release of results that may influence statistically unsophisticated judges and legislators in their resolution of important legal issues? There is no certain answer. The decision depends on the costs of making type I and type II errors.[51] The conventions of social science, however, do suggest an answer: At a significance level of .05 one is generally justified in concluding that the relationships

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49. The example should make clear that regardless of the results of the significance tests, difficulties of inference remain. For example, there might be an association among all cases between jury size and the proportion of hung juries, but this association might reflect the fact that attorneys typically choose larger juries for more complicated cases and that such cases are likely to hang regardless of jury size. This is one reason why findings that are of statistical significance may be of no significance in any practical sense.

50. *See* note 48 *supra*.

51. For a given sample size the probability of type II error increases as the probability of type I error decreases. For a given significance level, the probability of type II error decreases as sample size increases.

in the data are not due simply to chance. More importantly, the conventions implicitly assume that significance levels much above .05 justify or indeed require the decision not to reject the null hypothesis. Thus, relationships significant at the level of .1 or greater are often not reported in the literature or, if reported, are mentioned as not significant.[52] Too often there is little evidence that the researcher has thought about the suitability of the conventions for his particular problem.

The difficulty with accepting conventional significance levels as a guide in jury-size research stems from the fact that these levels are selected to be very conservative with respect to type I error. This conservatism reflects the values of social science. Data-based theory must rest on relatively firm foundations. Multiple replications of research to ensure the reliability of findings are often expensive, difficult to accomplish, and rarely accompanied by the prestige accorded original studies. Hence original research must carry facial guarantees that the results reported are not artifacts of chance. Relatively stringent significance levels are therefore required before a relationship may be assumed to exist and a theory's support acknowledged.[53]

The values of social science, however, are not the values of the law. When the Supreme Court rejects a constitutional attack on six-member juries partly on the ground that such a shift will not change trial results, surely the Court ought to be more concerned with type II error, the possibility that available research has failed to reveal true differences between the verdicts rendered by different size juries, than with type I error, the possibility that reported size effects do not in fact exist.[54] Legally, the argument is that the

52. Although the conventions of social science describe a behavioral norm, researchers may reject them in some circumstances. Hans Zeisel has suggested that researchers interested in generating hypotheses be more venturesome in interpreting data and less captivated by conventional levels of statistical significance. *See* Zeisel, *The Significance of Insignificant Differences*, 19 PUB. OPINION Q. 319, 320-21 (1955). One problem is that it takes a certain degree of sophistication and confidence in what one is doing before one feels justified in disregarding what is conventional about a discipline. To judge by the published literature, much law-related research is done by individuals lacking sophistication or self-confidence. The danger of giving undue respect to conventional significance levels is not one that inheres in the research problem, but one that is very likely to occur in practice.

53. Ironically, the social science professions are structured so as to increase the probability that a study reporting a significance level will be the aberrant one of twenty. Researchers are unlikely to publish, or be able to publish, their results unless significance levels of about .05 are attained. Yet, if enough researchers work on the same problem, it is likely that at least one will achieve results significant at about .05 by chance. *Cf.* Good, *Fallacies, Statistical*, 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 292, 296 (1968).

54. Professors Zeisel and Diamond comment:

framers of the Bill of Rights contemplated a body of twelve when they used the term "jury." Despite the Supreme Court's equivocation on this point in *Williams*, the history seems clear.[55] Therefore,

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We do not quite share your views on "significance." Whatever conventions exist, and whatever the logical explicit rationale—the issue which you claim to address (but do not focus on) is: whether or not the Court should act, in one direction or the other, following the significance calculus. But this is a practical question which depends on a cost-benefit accounting of what would be lost (in justice, money, time, etc.) if the decision were in error. It is the combination of the significance calculus and the cost-benefit analysis that should form the proper basis for the decision.

Letter, *supra* note 37. I do not disagree with the conclusions that Zeisel and Diamond reach. *Cf.* text following note 181 *infra*. However, my point in this discussion is somewhat different from the one they suggest. I am not stating how a court "should" act; rather, I am commenting on the kinds of data that researchers less sophisticated than Zeisel and Diamond are likely to present to courts and the way in which many jurists are likely to react to the statistical results presented to them.

55. Justice White, writing for the majority in *Williams*, briefly traced the history of the jury in an effort to suggest that the framers of the Constitution and the Bill of Rights were not *necessarily* contemplating a body of twelve when they used the term "jury." Justice White's discussion concludes:

> We do not pretend to be able to divine precisely what the word "jury" imported to the Framers, the First Congress, or the States in 1789. *It may well be that the usual expectation* was that the jury would consist of 12, and that hence, the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in the "intent of the Framers" of an explicit decision to equate the constitutional and common-law characteristics of the jury.

399 U.S. at 98-99 (emphasis added) (footnote omitted). The use of the equivocating words in italics, like the use of the term "experiments" to refer to the research cited in *Williams*, *see* text at notes 9-10 *supra*, is disingenuous at best. A more accurate statement would have been that the framers almost certainly contemplated a body of twelve when they used the term "jury." Jury size was infrequently and incidentally mentioned in the debates surrounding the adoption of the Constitution and Bill of Rights, but that is probably because the fact that juries were bodies of twelve was so universally assumed as to go almost without saying. Thus, most references to the jury by the framers do not mention size. There was, however, one explicit comment. Governor Randolph, speaking in the Virginia ratifying convention about the article III guarantee of jury trial in criminal cases, stated: "*There is no suspicion that less than twelve jurors will be thought sufficient.*" 3 ELLIOTS DEBATES 467 (emphasis added). For further remarks indicating that the framers implicitly assumed that the petit jury would be made up of twelve, see the remarks by Governor Randolph, *id.* at 469, Patrick Henry, *id.* at 544, and Edmund Pendleton. *Id.* at 547. In the North Carolina ratifying convention there were some remarks that suggested that the mode of trial by jury mandated by the Constitution would be somewhat different in the different states, but there is no suggestion that the size of the jury might be other than twelve. *See* the remarks by Archibald Maclaine, 4 *id.* at 176, and Richard Spaight. *Id.* at 208.

James Wilson, one of six men to sign both the Declaration of Independence and the Constitution, a contributor to the Constitutional Convention second only to Madison, one of the original appointees to the Supreme Court, and one of the nation's first law professors, began a lecture on the jury by stating: "When I speak of juries, I feel no peculiar predilection for the number twelve: a grand jury consists of more, and its number is not precisely fixed." 2 THE WORKS OF JAMES WILSON 503 (R. McCloskey ed. 1967). However, his subsequent comments make it clear that, whatever leeway he would allow grand juries, he conceived of the petit jury as a twelve-member body. He writes, "What is a verdict? It is the joint declaration of twelve jurymen upon their oaths," *id.* at 524, and, "My theory is shortly this. To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." *Id.* at 528. *See also id.* at 506, 515.

those who argue that jury size is not defined constitutionally, because size does not affect verdicts and hence has no relationship to sixth and seventh amendment values,[56] should have the burden of

Further evidence that the framers assumed that the term "jury" referred to a body of twelve is found in the writing of Blackstone. Blackstone, in the most influential legal treatise in colonial America, wrote: "[N]o man should be called to answer . . . for any serious crime, unless . . . the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors . . . ." 4 BLACKSTONE, COMMENTARIES *349-50. Blackstone also wrote that "[w]hen the trial is called on, the jurors are to be sworn . . . to the number of twelve . . . ." *Id.* at *352.

The majority in *Williams* supports its argument for a distinction between the common-law and constitutional conceptions of juries by arguing that "even though the vicinage requirement was as much a feature of the common-law jury as was the 12-man requirement, the mere reference to 'trial by jury' in Article III was not interpreted to include that feature." 399 U.S. at 96. A major difficulty with the majority's argument is that, unlike the situation with respect to the twelve-member feature, it does not appear that there was substantial agreement among the states as to what a vicinage requirement would mean, because the states differed in the degree to which they required jurors to be drawn from the neighborhood or county in which the crime had occurred. Whatever the common law of England, it does not appear that there was any uniform rule in the original states with respect to vicinage at the time the Constitution was written or the Bill of Rights enacted. Consider, for example, Madison's comments in a letter to Edmund Pendleton:

> [The Senate] are . . . inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word juriés—"with the accustomed requisites"—leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. *The truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject.*

5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 211 (1905) (emphasis in last sentence added). The majority in *Williams* reproduces this portion of the Madison letter. 399 U.S. at 95-96. However, the italicized sentence is replaced with ellipses. The majority in *Williams* does cite in a footnote an earlier letter of Madison to Pendleton, in which Madison wrote: "In many of the States, juries, even in criminal cases, are taken from the State at large; in others, from districts of considerable extent; in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage*, which has produced a negative on that clause . . . ." 399 U.S. at 95 n.39, *quoting* Letter from James Madison to Edmund Pendleton, Sept. 14, 1789, in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491 (1865).

Significantly, the Supreme Court in prior decisions had always found that the term "jury" as used in the sixth amendment referred to a jury of twelve. *See, e.g.*, Patton v. United States, 281 U.S. 276 (1930); Thompson v. Utah, 170 U.S. 343 (1898).

Although I feel that White's historical analysis in *Williams* was colored so as to lend undue support to the majority's opinion, my conclusion, based on what I believe is a fairer reading of history, is not far from the Court's conclusion. Even if the framers did conceive of juries as bodies of twelve, I see no reason, given that the framers chose not to specify the number of jurors, why jury size cannot be constitutionally reduced *so long as the values protected by the sixth and seventh amendments are not thereby threatened.* My reading of history does lead me to disagree with White in one important particular, however. Since it was almost certainly contemplated at the time the sixth and seventh amendments were written that the juries to which they referred would be made up of twelve, those who argue for a reduction in jury size should be required to prove by the weight of the available evidence that a change in jury size does not threaten any of the interests that those amendments were designed to protect. If the evidence is so ambiguous that one cannot honestly reach such a conclusion, no change should be allowed at this time.

56. This is obviously a non sequitur, although I think it reflects the logic of many

empirically proving the lack of relationship. Instead, the uncritical use of significance tests in jury-size research puts a heavy burden of proof on partisans of the status quo.[57]

Researchers may compound the problem by reporting results that do not reach conventional levels of statistical significance as "not significant." Jurists or legislators may be understandably misled. They may mistakenly read the term "significance" in its ordinary rather than statistical sense and conclude that it has been affirmatively demonstrated that there is no difference in verdicts rendered by different-sized juries.[58]

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who argue that jury size is, within limits, constitutionally irrelevant. For a discussion of other values that the sixth and seventh amendments are arguably designed to promote, see note 209 *infra*.

57. If, for example, research reveals that verdict differences associated with jury size are significant at the .20 level, the odds are four to one that the observed differences are not due to random factors. Yet from this data many researchers would uncritically conclude that there is no significant difference in the verdicts of different-sized juries.

58. Two other problems with the use of significance tests in jury size (and other) research are worth mentioning, although they do not favor findings of "no discernible difference." The first is whether significance tests are appropriate at all absent random sampling procedures. Strictly speaking, for example, none of the real-world studies discussed in *Colgrove* were based on a random sample of cases. They all involved populations of cases defined by jurisdiction and time period. Some would argue that this means that tests of statistical significance are simply inappropriate. Others would present two justifications for using these tests: First, cases across jurisdiction or time period or both are in the aggregate so similar that the cases studied resemble a random sample of this larger aggregate. Second, the significance tests are merely being used to assess the probability that random factors other than sampling might lead to differences as large as the difference observed. The second argument is clearly tenable, the first more doubtful. Regardless of the justification, one should be aware of exactly what the significance test is testing. For a discussion of these issues, see D. Morrison & R. Henkel, The Significance Test Controversy (1970).

A second general problem has to do with the "significance" of significance tests. Significance levels depend directly on sample size. With large enough samples one usually can find a statistically significant relationship between any two variables. Most such associations will be completely unimportant for any scientific or practical purpose. Given a statistically significant relationship, importance is better judged by the strength of the association revealed. Except where correlation coefficients are involved, research published in law reviews rarely includes measures of strength of association. One problem with such measures is that except at the extremes, many of the most common nonparametric measures have no clear intuitive meaning. Whether or not measures of association are presented, the important issue in determining practical significance will often be the strength of the relationships revealed. One must be sensitive to this question and not accept a result as important simply because it is statistically significant. In many cases, a percentage distribution will provide an adequate means for assessing the importance of results. If, for example, in a very large sample it was discovered that twelve-member juries hung 5.001 per cent of the time while six-member juries hung 5.0 per cent of the time, the difference of .001 per cent might attain a high level of statistical significance yet be reasonably dismissed as unimportant. On the other hand, had the difference been 3 per cent it might have been thought important, although, if the sample were sufficiently smaller, the attained significance level might not be as high as it was in the first case. For a discussion of measures of strength of relationship, see, e.g., H. Blalock, *supra* note 47, at 225-34.

E. *The Real Issue*

The argument thus far is that for the following reasons the results of apparently sound methods of empirical research are likely to suggest that jury size has no discernible effect on jury verdicts, even if size does in fact determine verdicts in some cases: First, unless the researcher is able to identify *a priori* those few cases that are good candidates for size effects, differences attributable to size are likely to be so diluted in the sample studied as to appear nonexistent or unimportant; second, verdict differences attributable to size are likely to be disguised if comparisons are made on an aggregate basis; third, conventions of statistical analysis will lead researchers to be overly cautious in interpreting findings that indicate possible size-associated differences in jury verdicts.

Of these three potential problems the first is in a sense the most fundamental, for it infects the other two. Findings of no aggregate size effects or of statistical insignificance become more likely when the cases studied include many in which no size effect can be expected. Yet one might reasonably object that the labored analysis suggesting that only fifteen per cent of all cases are candidates for size effects proves too much. That analysis, if accepted, proves that jury-size differences will affect at most about one sixth of all verdicts rendered. If this is so, does it not support the Court's decision in *Williams*? If even the most sensitive research is likely to show that the proportion of cases in which verdicts are affected by jury size is small, why should not the system opt for the sure savings engendered by smaller juries?[59]

This would be a strong argument if size effects, where they exist, are unrelated to other values. If one cannot say that in cases of size-linked disagreement the verdicts of twelve are likely to be "better" with reference to some value than the verdicts of six, what apart from history argues in favor of twelve?[60] If, on the other hand, the divergences between six- and twelve-member juries are systematically related to other values, there may be important reasons to continue with the larger jury.[61] If, for example, verdicts of six are more likely

59. Zeisel and Diamond estimate that the federal court system would save about four million dollars annually if all civil juries were reduced from twelve to six. Zeisel & Diamond, *supra* note 10, at 294. If federal criminal juries and all state juries were reduced to six, these savings would be multiplied several times over.

60. I suggest later that some other factors might exist. *See* note 209 *infra*.

61. It may be that the cases of divergence are disproportionately those that motivated the framers to guarantee a right to jury trial in the first place. For example, one might ask why there is a jury system in criminal cases at all. Why not just use the judge? Verdicts would be different in fewer than one third of the cases heard, and, given plea bargaining, this represents only a small fraction of the cases reaching the

to reflect prejudice against minority groups than verdicts of twelve, a strong argument exists for retaining the larger jury despite the extra costs involved. A small percentage of cases may still be an absolutely large number.[62] In the next section I will draw on statistical theory and group dynamics research to speculate on the ways in which verdicts of six are likely to differ from those of twelve. This should provide some insight into the values affected by changes in jury size and will suggest designs for jury research that should reveal size effects that do in fact exist.

II. Verdict Differences and Jury Size: The Direction of Effects

A. *Bases for Analysis*

In this section I will try to pinpoint some of the reasons why size differences may be expected to lead to verdict differences and suggest the directions that these differences are likely to take. In this effort I draw on common sense, sampling theory, and the social-psychological literature on behavior in small groups. Reliance on the last two of these poses problems. The sampling model postulates that jurors are selected by some independent random process. Although one may assume that a particular venire is selected from a given population at random,[63] it is clear that chance does not en-

courts. One answer is that the differences between judge and jury are highly directional. The tendency of juries to be more lenient and to interpret laws from the public's perspective may be an important reason why the framers thought it necessary to guarantee a right to jury trial in the Constitution. *Cf.* Sax, *Conscience and Anarchy*, 57 Yale Review 481 (1968). The discussion thus far suggests that the twelve-member jury is more likely than the six-member jury to promote important values in its decision-making. This is, of course, an empirical question. It is possible that the six-member jury has important advantages over the twelve-member jury with respect to important values. To the extent it does, the case for six is considerably strengthened.

62. The authors of The American Jury, *supra* note 7, at 12, noted that in 1955 alone 60,000 criminal jury cases were tried to a verdict. A 5 per cent rate of difference in decisions by six- and twelve-member juries would produce 3000 cases in which size affects verdicts; a 15 per cent rate would produce 9000 such cases. Thus, over a period of years and including civil cases, a small percentage difference in results due to jury size will reflect an absolutely large number of cases.

63. Discrimination against a group in jury selection may occur at two stages. The group may be underrepresented in the population from which the jury is drawn or the selection of jurors from a particular population may be conducted in such a way that members of certain groups serve less frequently than their proportion in the population would indicate. (The word "population" is used here and in this paper to refer to the list of names from which the court official selects the venire for a term; it does not refer to the general population of an area, although the characteristics of prospective jurors as a group should be more or less congruent with the characteristics of the area's adult population.) Discrimination in the first sense would be illustrated by procedures that excluded all blacks in the district from the population from which jurors were drawn. Discrimination in the second sense would be illustrated by a procedure in which a court clerk failed to summon any blacks whose names were

tirely determine the final composition of a sitting jury. Judges may exclude individuals for hardship or for cause, and attorneys may exclude potential jurors on a peremptory basis. Nevertheless, I believe that the arguments based on sampling theory remain sound.

Exclusions by the judge for cause or at the prospective juror's initiative may be thought of as refinements in the population from which jurors are selected[64] rather than distortions of a random sampling process. Excuses by the judge for cause promote the ideal of the unbiased jury,[65] and excuses for hardship are in no obvious systematic way related to the likely attitudes of the excused individuals. The allowance of peremptory challenges poses more difficulty since lawyers challenge those jurors whom they view as likely to decide against them. This suggests that challenges might nullify an important difference between six- and twelve-member juries—the higher probability that the latter will contain individuals with viewpoints held by a minority of the population. If the

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drawn. The statistical model to be developed makes certain assumptions about the population or jury list from which a venire is drawn; hence the argument based on the model is unaffected by whether the population with the assumed characteristics represents a fair or biased selection from some larger population of individuals. The model does assume that selection for actual jury service from the jury list will be by some independant random procedure. Conclusions drawn from the model are threatened to the extent that deviation from such procedures with respect to relevant characteristics occurs. It does not matter whether deviations from chance are the results of invidious discrimination, such as the failure to call any blacks, or permitted procedures, such as the peremptory challenge. For a discussion of the statistical analysis of jury discrimination, see Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

64. If one could identify in advance those individuals so involved in or opinionated about a case that they could not decide fairly or those so inconvenienced by jury duty that it would be a hardship for them to serve, one would exclude these individuals from the list of potential jurors. This happens with certain classes of individuals, such as convicted felons, who are excluded for reasons unrelated to their ability to decide fairly. While such exclusions make the jury less representative of the larger community, they do not remove a sufficient percentage of those representing relevant minorities to invalidate assumptions of substantial minority representation in the population. *See* Tables One & Two *infra*, where it is assumed that relevant minorities may constitute from zero to fifty per cent of a population. If one were to assume, for example, that all blacks would be excused on request because they could not afford transportation expenses to court, then arguments based on these tables with respect to a black point of view would not hold.

65. If the biased or involved individual is more likely to sway a jury or to be unaffected by the facts, his removal should lead to greater verdict similarity between different-sized juries, since a twelve-member jury is more likely than a six-member jury to contain such individuals. To the extent that jurors challengeable for cause are discovered and excluded, a potential normative advantage of the six-member jury is eliminated. However, it is clear that not all such jurors are discovered and removed. *See, e.g.*, Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99 (1966); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

"minority"[66] is so small that it is unlikely to be represented on the six-member jury, the twelve-member jury will rarely have so many minority representatives that they could not all be peremptorily removed.[67] However, so long as the ratio of permitted challenges to jury size remains constant, the effect of peremptories is mitigated by their availability to both parties and by the fact that challenged jurors will be replaced randomly. Furthermore, members of certain recognizable minorities may not be challenged, either because no connection is perceived between the juror's minority status and his likely decision or for other tactical reasons.[68] Most importantly, many factors likely to affect juror decision-making are not or cannot be discovered during voir dire, and so cannot be the basis of a peremptory or for-cause challenge.[69] These nonrandom elements in the final selection of the trial jury do mean, however, that the apparent precision of a statistical analysis based on the assumed random sampling of jurors is false; hence the statistical analysis should be taken as no more than an indication of the likely direction of jury-size effects and a loose estimation of their magnitude.

Different problems exist in drawing on small-group research for clues as to likely differences in the dynamics of different-sized

66. The term "minority" is used herein to refer to all sorts of minorities (*e.g.*, racial minorities, opinion minorities, the minority who have been in an auto accident).

67. The distorting effect of peremptory challenges on the statistical arguments with respect to minority representation increases with the absolute number of allowed challenges. However, if the same number of challenges is allowed before juries of six as is allowed before juries of twelve, reported size effects are likely to be exaggerated in certain circumstances.

68. Broeder, 38 S. CAL. L. REV., *supra* note 65, at 505, reports that some lawyers felt that challenging veniremen would irritate those finally selected as jurors, and that some jurors disapproved of challenges to blacks on the apparent basis of race. *Id.* at 526. Personal injury lawyers apparently face particular difficulty when they must decide whether to challenge the obviously handicapped.

69. Voir dire may fail to uncover information that might be revealed by more skilled questioning or honest answering, *see, e.g.*, Broeder, 45 NEB. L. REV. 99, *supra* note 65; Broeder, 38 S. CAL. L. REV. 503, *supra* note 65, and the process may not be well-suited for the discovery of character traits likely to affect juror decision-making. For example, authoritarianism or sex-role identification, traits unlikely to be revealed except through psychological testing, have been found to affect the decisions of individuals faced with trial-type problems. *See, e.g.*, Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Lipsitt & Strodtbeck, *Defensiveness in Decision Making as a Function of Sex-Role Identification*, 6 J. PER. & SOC. PSYCH. 10 (1967); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PER. & SOC. PSYCH. 123 (1973); Rokeach & Vidmar, *Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial*, 3 J. APP. SOC. PSYCH. 19 (1973). Interestingly, a team of lawyers and social scientists collaborating on jury selection in the trial of the "Harrisburg 7" identified as generally favorable two jurors who together hung the jury against acquittal on several counts. Schulman, Shaver, Colman, Emrich & Christie, *Recipe for a Jury*, 6 PSYCH. TODAY 37 (May 1973).

groups. Subjects of such research are typically college students[70] motivated by small monetary payments or course requirements. They are given limited time to solve problems quite different from those faced by jurors. Furthermore, much of the literature relevant to size effects deals only with gross differences between group and individual decision-making, while research designs that do vary size are frustratingly often limited to groups of between two and six or seven members. Size effects reported in such research may not hold for groups of six and twelve members. Finally, inconsistencies among studies raise questions about the reliability of certain findings.

Although the tentative nature of any conclusions based on small-group research must be emphasized, these studies nevertheless form the basis for the most educated guesses one can make about likely differences between the dynamics of six- and twelve-member groups. Some findings in particular have been replicated in enough different circumstances that they appear to provide relatively reliable information about the ways in which individuals act in groups;[71] heavy reliance is placed on such findings in the discussion that follows.

At a conceptual level, one may distinguish between the way in which numbers affect the membership of different-sized groups[72] and the way in which numbers affect interaction in different-sized groups.[73] In practice the distinction is difficult to maintain, because there is no neat way to separate the extent to which the dynamics of different-sized groups turn on composition from the extent to which they turn on other factors that are a function of numbers. Neverthe-

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70. Such groups pose particular problems because they are likely to be relatively homogeneous in social status, and some are sexually homogeneous as well. Some of the best available studies, involving individuals actually called for jury duty who listened to tape-recorded rather than actual trials, indicate that differences of social status and sex are strongly associated with the roles that individuals play in jury deliberations. *See* R. SIMON, *supra* note 32, at 113-19; C. Hawkins, *supra* note 32, at 30-41; James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959); Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713 (1957); Strodtbeck & Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3 (1956).

71. *E.g.*, the body of work on conformity inspired by the classic studies of Sherif, *Group Influence upon the Formation of Norms and Attitudes*, in READINGS IN SOCIAL PSYCHOLOGY 77 (T. Newcomb & E. Hartley eds. 1947), and Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in GROUP DYNAMICS 189 (2d ed. D. Cartwright & A. Zander 1960).

72. For example, numbers may result in differences in the incidence of minority representation.

73. For example, a larger group must be arranged in a physically different way than a smaller group, and such differences might have ramifications for patterns of interaction. *See, e.g.*, Strodtbeck & Hook, *The Social Dimensions of a Twelve-Man Jury Table*, 24 SOCIOMETRY 397 (1961).

less, this discussion will loosely follow such a distinction. First, I will discuss differences in jury composition associated with size and their dynamic implications. Then I will focus on size effects as they more generally affect the quality of group decision-making.

B. *The Likelihood of One Minority Juror*

For present purposes, the most important distinctions between six- and twelve-member groups drawn randomly from the same population are (1) that the members of the larger group are likely to be more broadly representative of the population from which the groups are drawn, and (2) that the average characteristics of the larger group are likely to approach more closely the average characteristics of the population from which the groups are drawn. The greater representativeness of the larger group results from the obvious fact that an individual with a given characteristic is more likely to appear in a random collection of twelve individuals than in a random collection of six.[74] Thus, the presence of jurors with viewpoints, abilities, quirks, or racial identities that characterize only a minority of the population is more likely with larger juries.[75]

Table One presents the probabilities for juries of six and twelve that no jury members will have a characteristic found among a specified percentage of the population. Over most of the range of population percentages the differences between probabilities for the two sizes are substantial.[76]

The meaning of figures in the Table can be illustrated by an example. Let us assume the minority characteristic to be race and the population figures to represent the percentage of black individuals

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74. This greater probability is a function of the fact that an individual with a given characteristic has twelve chances to appear in a group rather than six.

75. For the same reason, factors that characterize a majority of the population are more likely to be found among members of a twelve-member jury than among those on a six-member jury; an all-black jury in a jurisdiction that is 90 per cent white is more likely if the jurisdiction seats juries of six than if it seats juries of twelve. However, since such unrepresentative juries are very unlikely with juries as large as six, the textual discussion will focus on factors that characterize only a minority of the population.

76. The calculations presented in Table One and in Tables Two and Three *infra* assume independent random sampling with replacement. (The fact that the replacement assumption does not hold with respect to juries is not important because the population from which jurors are sampled is large enough so that lack of replacement does not affect the calculations.) The formula used is the binomial expansion:

$$(p+q)^n = \sum_{k=0}^{n} (n^n - k)p^k q^{n-k},$$

where p = probability of a member of the population having the characteristic; $q = 1 - p$ = probability of a member not having the characteristic, and n = sample size.

TABLE ONE

PROBABILITIES FOR JURIES OF SIZES SIX AND TWELVE THAT NO JUROR WILL BE SELECTED WITH A CHARACTERISTIC SHARED BY GIVEN PERCENTAGES OF INDIVIDUALS IN THE POPULATION FROM WHICH THE JURY IS DRAWN

	Probability of no juror being chosen with particular characteristic	
Percentage of individuals sharing characteristic in the population	Six-member juries	Twelve-member juries
55-100%	0.00	0.00
50	.016	0.00
45	.028	.001
40	.047	.002
35	.075	.006
30	.118	.014
25	.178	.032
20	.262	.069
15	.377	.142
10	.531	.282
5	.735	.540
0	1.00	1.00

in the population from which the jury is drawn.[77] In a population forty-five per cent black, one would expect about twenty-eight six-member juries in every thousand to have no black members; only one in a thousand twelve-member juries would contain no blacks. If blacks constitute twenty-five per cent of the names on the jury list, about one out of six six-member juries would have no black members; this compares to about one out of thirty for juries of twelve. Finally, if blacks constitute only ten per cent of the population, slightly more than half of the six-member juries would be without blacks, compared to a little more than a fourth of the twelve-member panels.

It may make both common and constitutional sense to state, as the Supreme Court has, that so long as the procedures by which juries are selected are fair and nondiscriminatory, minority groups are not entitled to any specific degree of proportional representation;[78] nevertheless, it should be recognized that a reduction in jury size threatens some of the same values as are threatened by overt discrimination.[79]

77. Because blacks are likely to be underrepresented in the sampling frame from which jurors' names are drawn (*e.g.*, voting lists), the degree of underrepresentation apparent to black parties before courts is likely to be greater than these figures suggest.

78. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 471 (1952); Neal v. Delaware, 103 U.S. 370, 394 (1880).

79. Justice Black, writing for the majority in Smith v. Texas, 311 U.S. 128 (1940), stated: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified

While trials in which the presence of a single black juror would affect the verdict may be rare, common sense suggests at least two such situations. The first occurs when the presence of a black might inhibit other jurors from expressing prejudices that if expressed might influence the deliberative process.[80] A remark such as, "After all, he's black; he's probably committed some other crime if not this one" could influence potential holdouts for acquittal, particularly if made at the end of an exhausting deliberation process when a minority was looking for reasons to renounce their earlier commitments. If the remark were not made, potential holdouts might not be influenced by the idea behind it, even if they privately believed that the defendant's race made it likely that he had committed other crimes. The possibility of resolving a difficult decision-making problem by this kind of rationalization might not occur to some jurors who would assent to the remark if it were made. Or, each juror, so long as he thinks he alone holds the belief in question, might be reluctant to act on it.[81]

The second situation in which the presence of at least one black might influence the jury verdict is where the black juror possesses expertise that allows him to give other jurors important information. Broeder, for example, reports that in one case he studied the ability of a black juror to explain why a black youth might flee from the police even if innocent may have influenced the jury's decision.[82] In other cases, the interpretation of argot may be important.[83]

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groups . . . is at war with our basic concepts of a democratic society and a representative government." 311 U.S. at 130. As has been stated, the representative nature of the jury is decreased when it is reduced in size from twelve to six. This very fact makes it more difficult to prove statistically that a set of juries with little or no minority representation was chosen by a process that was discriminatory, because the probability that such a set of juries would be chosen by chance increases when jury size is reduced. For a discussion of the statistical proof of jury discrimination, see Finkelstein, *supra* note 63.

80. In a series of post-verdict juror interviews, Broeder found that the presence of a black woman on a jury did not prevent two jurors from voicing strong anti-black sentiments. However, the trial referred to occurred in 1954 in an Illinois city that was segregated in some respects; it appears much less likely that racial prejudices would be expressed so freely in front of blacks today. Even in the trial studied, the presence of the black woman may have been crucial. She berated the men because of their statements, and some jurors, including at least two who were strongly prejudiced, voted for acquittal because they did not want to be associated with these men. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 23.

81. Sociologists term a situation in which each member of a group mistakenly believes that he alone has a particular belief or engages in a particular kind of activity a situation of "pluralistic ignorance." Action in such situations differs from action that would be expected if the individuals were aware of the beliefs or acts of others.

82. Broeder, *supra* note 80, at 30.

83. In the trial of Huey Newton, the meaning within the black community of the phrase "take care of business" was apparently of some importance. Address by Herman

While there is a danger that the presence of a single black would cause other jurors to defer too much to one who dishonestly or mistakenly purports to have cultural expertise, this danger is probably less than that of misunderstanding a peculiar feature of black culture. Furthermore, the potential danger of deference may well increase with smaller juries. The best counter to an unwarranted prima facie claim to expertise is the presence of another individual with a similar prima facie claim but with a different viewpoint. The twelve-member jury is more likely than the six-member jury to have two or more blacks to correct or corroborate each other. Indeed, so long as black representation in the jury population is much above ten per cent, the chances of finding only one black on a jury are greater with six than with twelve.[84]

If my argument about the role that blacks might play in jury deliberations is correct, there may indeed be differences in the results reached by different-sized juries, and in situations of difference the retention of the twelve-member jury would promote informed, unbiased fact-finding. But my choice of blacks as an example may strike some as biasing the value conclusion. Just as juries of twelve are more likely than those of six to have black members, so are they more likely to have bigoted members; just as they are more likely to have individuals with helpful personal experiences, so are they more likely to have individuals who are beyond all reason.[85] Clearly any scheme that increases the probability of minority representation on juries is a two-edged sword with respect to values important to the legal system. It does not

Blake, black sociologist who testified at the Huey Newton trial, National Conference of Kent Fellows, Columbia, Mo., August 1968.

84. The probabilities of finding *only* one minority group member on six- and twelve-member juries are as follows:

Proportion minority representation in population	Probability of one and only one minority juror	
	Six-member juries	Twelve-member juries
.50	.093	.003
.45	.136	.007
.40	.186	.018
.35	.244	.036
.30	.302	.071
.25	.356	.126
.20	.393	.211
.15	.399	.301
.10	.355	.377
.05	.232	.342

85. For example, an individual who believed that God had ordained a conviction apparently prevented acquittal of the "Harrisburg 7" and hung the jury on certain counts. *See* Schulman, Shaver, Colman, Emrich & Christie, *supra* note 69.

follow, however, that the edges are equally sharp. For several reasons, the benefits of the increased representation of minorities with favored viewpoints that the choice of twelve entails should far outweigh any detriment associated with the increased representation of minorities holding disvalued positions.

First, many of the most disvalued minority positions are likely to be so uncommon that they will rarely be represented even on a jury of twelve. While six-member juries would be even less likely to contain such members, the absence of widespread stories about juries being hung by bigots or irrational persons, for example, suggests that few such individuals are ever seated even on twelve-member juries.[86] Not only is the incidence of such individuals likely to be low in the general population, but if called for jury duty such individuals, if spotted, may be challenged for cause on voir dire.

Second, an individual holding a normatively disvalued position, such as a bigot, might be reluctant to voice his views to strangers, probably would have his position refuted if stated, and might well not vote in accord with his predilections either because of pressure from his fellow jurors or because he realizes that in the context of a jury trial such a vote is inappropriate.[87] In addition, the mere presence of such an individual is unlikely to dissuade others from voicing generally approved positions, while the mere presence of other visible minorities, such as blacks, might keep individuals from voicing normatively disapproved positions.

Finally, the twelve-member jury is less likely to be completely aberrant than the six-member jury in that it is less likely to be entirely or overwhelmingly composed of those who represent disfavored positions in the community.[88] Since one would expect those whose opinions or attitudes are well anchored in community values to be particularly tenacious,[89] their presence should guarantee at

86. *But see* Hunter, *Law in the Jury Room*, 2 Ohio St. L.J. 1, 18-19 (1935); note 85 *supra*.

87. Broeder, *supra* note 80, at 23, suggests that a number of prejudiced jurors consciously suppressed their biases in voting to acquit a black defendant.

88. *See* note 75 *supra*.

89. Nahemow and Bennet conducted a relevant study in a New York home for the aged. They found that those who generally conformed most to the informal residential norms of the homes were most resistant to counternormative persuasion on certain issues. These individuals generally had a greater stake in the home as a place to live. They were not disproportionately resistant to persuasion, however, with respect to matters not anchored in home norms, such as political issues or the question of which of two pictures was preferable. Nahemow & Bennet, *Conformity, Persuasibility and Counter-normative Persuasion*, 30 Sociometry 14 (1967). Similarly, Newcomb found that Bennington women who resisted the college's liberal norms tended to have strong roots in reference groups that also rejected the college's norms. Newcomb, *Attitude Development as a Function of Reference Groups: The Bennington Study*, in Readings

least a hung jury in a situation in which most jurors are motivated by considerations that the larger community would regard as improper. A jury in which few or no members represent basic community values, though unlikely at either size, is far less likely with twelve than with six.

C. *The Likelihood of Two Minority Jurors*

It should be obvious that the argument that minorities are more likely to be represented on juries of twelve than on juries of six applies to minorities of all kinds, not just to such visible minorities as racial groups. In particular, the argument applies to attitudinal and perceptual minorities. The twelve-member jury is more likely to have one or more members who believe that high damage awards raise insurance rates or who have caught a subtle contradiction in the defendant's testimony. Individuals with unique perceptions or attitudes may disproportionately influence jury verdicts if other jurors do not hold conflicting attitudes or perceptions. However, where conflicts of attitude or perception do exist, the psychological literature provides substantial evidence that an individual in the minority is unlikely to resist group pressures to conform unless he becomes aware that at least one other member shares his position.[90]

The research supporting this conclusion has its roots in Asch's famous experiment, which became a paradigm for further research.[91] Asch required a subject to state which of three lines matched a criterion line. Subjects responding alone made virtually no errors. However, when naïve subjects responded in a group after seven others, each of whom made the same incorrect response, almost one third of the subjects responded incorrectly as well. In these conditions even those giving correct responses evidenced considerable agitation. Post-experiment interviews revealed that many of the conforming subjects had conformed only on the surface; they

IN SOCIAL PSYCHOLOGY 265 (3d ed. E. Macoby, T. Newcomb & E. Hartley eds. 1958). These findings also suggest that normative deviants may belong to minority groups that provide relatively strong anchorage for their values or attitudes.

90. It apparently is not unusual for jurors to vote in ways contrary to their convictions. *See generally* Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968). Hawkins and Simon found that 12.8 per cent and 10 per cent of their jurors respectively were willing to admit that they voted against their preferred positions. C. Hawkins, *supra* note 32, at 102; R. SIMON, *supra* note 32, at 64. These figures may underestimate the percentage of unconvinced jurors because some may not have wanted to admit that they voted contrary to their beliefs. On the other hand, knowledge that they were participating in mock trials may have led some to capitulate when they would not have done so in a real trial.

91. *See* Asch, *supra* note 71. Asch was building on research reported by Sherif, *supra* note 71.

had continued to believe throughout the experiment that the group was wrong but had changed their answers because they did not want to appear different. Others actually had been persuaded; they became convinced that the group's choice, although different from theirs, was correct. To the attorney, an actual shift in perspective is worth the same as simple conformity; only overt behavior is important. Once jurors have publicly affirmed their verdicts, later attacks on the ground that one or more jurors did not agree with the verdict pronounced are unlikely to be successful.[92]

Asch refined his early results in a series of experiments that led to several findings of particular relevance to the jury-size question. First he varied the size of the unanimous group majority and found that increases in the number of majority members beyond three produced no substantial increment in conformity rates.[93] Asch also found that if he added just one true respondent to the group, the conformity rates of the naïve subjects fell off dramatically, even though the subjects continued to face absolutely large majorities against them.[94]

Of course, the decision-making problems faced by an actual jury differ substantially from those faced by Asch's subjects. In general the jury will face problems that will be more difficult to solve, in which the evidence will be more ambiguous, and in which the very

92. *See* Note, *supra* note 90, at 109 n.33 (collecting cases).

93. *See* Asch, *supra* note 71, at 197. Other research has generally corroborated these results. *See, e.g.*, Kiesler, *Group Pressure and Conformity*, in EXPERIMENTAL SOCIAL PSYCHOLOGY 233, 257 (J. Mills ed. 1969); Rosenberg, *Group Size, Prior Experience, and Conformity*, 63 J. AB. & SOC. PSYCH. 436 (1961). Some reported research is somewhat inconsistent. Gerard and his associates found that conformity increased in a generally linear fashion among groups of sizes two through eight, but inspection of his data reveals that the bulk of the increase in conformity occurred by the time the majority reached three. In one of the two conditions Gerard studied there was no apparent consistent linear increase after the majority reached three. Gerard, Wilhemy & Conolley, *Conformity and Group Size*, 8 J. PER. & SOC. PSYCH. 79 (1968). Goldberg, *Three Situational Determinants of Conformity to Social Norms*, 49 J. AB. & SOC. PSYCH. 323 (1954), using groups of two and four, and Kidd, *Social Influence Phenomena in a Task-Oriented Group Situation*, 56 J. AB. & SOC. PSYCH. 13 (1958), using groups of two, four, and six, both reported statistically insignificant trends for conformity to increase linearly with size. The insignificance of the trend might call Asch's results into question, since Asch would predict a sharp increase in conformity between two and four. However, both of these studies used very ambiguous tasks (judging intelligence from pictures and estimating light flickers), and, more importantly, both involved a situation in which the experimenter reported an average group judgment to an individual repeating a task alone. In neither experiment was the subject confronted with fellow group members expressing their opinions and listening to his.

94. *See* Asch, *supra* note 71, at 195. This result has been corroborated by others and is generally accepted by social-psychologists. *See* Edmonds, *Logical Error as a Function of Group Consensus: An Experimental Study of the Effect of Erroneous Group Consensus upon Logical Judgments of Graduate Students*, 43 SOCIAL FORCES 33 (1964); Kiesler, *supra* note 93. *But cf.* Gorfein, *The Effects of a Nonunanimous Majority on Attitude Change*, 63 J. SOC. PSYCH. 333 (1964).

existence of a single correct answer might appear problematic.[95] Social-psychological literature suggests, however, that at least the first two of these differences should lead to stronger conformity effects than are found when subjects respond to simpler problems.[96] This is important if Asch's findings are to be generalized to the jury situation; astonishment that anyone should conform in the Asch situation sometimes leads readers to overlook the fact that only one third of the responses in Asch's experiment were conforming ones. When problems become more difficult or ambiguous, conformity rates can be double that or more.[97]

Columns one and two of Table Two present the probabilities that randomly selected six- and twelve-member juries will contain at least two individuals who share a specific perception or attitude

95. For a study of how jurors continuously revise their judgments as they receive new evidence in a close case, see Weld & Roff, *A Study in the Formation of Opinion Based upon Legal Evidence*, 51 AM. J. PSYCH. 609 (1938).

96. *See* Allen, *Situational Factors in Conformity*, 2 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 133, 167-68 (1965); Asch, *supra* note 71, at 199; Blake, Helson & Mouton, *The Generality of Conformity Behavior as a Function of Factual Anchorage, Difficulty of Task, and Amount of Social Pressure*, 25 J. PERSONALITY 294 (1957); Coleman, Blake & Mouton, *Task Difficulty and Conformity Pressures*, 57 J. AB. & SOC. PSYCH. 120 (1958); Deutsch & Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgment*, in GROUP DYNAMICS, *supra* note 71, at 211; Luchins & Luchins, *Social Influences on Judgments of Descriptions of People*, 60 J. SOC. PSYCH. 231 (1963).

One theoretical explanation for these results is the suggestion made by a number of writers that motivation to conform to group opinion comes from two distinct sources, one being normative and the other informational. *See, e.g.*, Allen, *supra*; Penner & Davis, *Conformity and the "Rational" Use of Unanimous Majorities*, 78 J. SOC. PSYCH. 299 (1969); Schulman, *Asch Conformity Studies: Conformity to the Experimenter and/or to the Group?*, 30 SOCIOMETRY 26 (1967). An individual looks to the judgment of others both to ascertain how others expect him to respond and because the reactions of others typically provide information about the nature of problems; indeed, much learning involves little more than learning how others categorize objects and events. When a problem is clear, individuals probably feel that there is little to gain from knowing how others would resolve it. When a problem is difficult, such as the problem of whether admittedly incriminatory evidence suggests guilt beyond a reasonable doubt, individuals may be more concerned with how the group expects them to behave. When evidence is ambiguous, individuals may be more willing to rely on the judgments of those who appear to find the evidence not ambiguous than would ordinarily be the case. Some theorists seeking to explain the Asch results suggest that individuals are perhaps conforming to what they believe to be the wishes or judgments of the experimenter, in addition to or instead of those of the group. *See* Luchins & Luchins, *supra* (such a perception can motivate substantial conformity to positions that would not otherwise be adopted); Schulman, *supra*. It seems probable, however, that the experimenter, like the group, is looked to only as a source of information on what responses are proper and as an expert on the reality behind the experiment.

97. For an extreme example of both ambiguity and conformity, see Jacobs & Campbell, *The Perpetuation of an Arbitrary Tradition Through Several Generations of a Laboratory Microculture*, 62 J. AB. & SOC. PSYCH. 649 (1961). Conformity may have been enhanced in this experiment, which involved the apparent movement of a stationary pinpoint of light in a dark room, because the subjects did not realize that the stimulus was almost completely ambiguous and the true answer was contrary to their perceptions.

when the population contains a given percentage of individuals who share the same perception or attitude. Generalizing uncritically from Asch's results, these are the probabilities of drawing juries in which an individual will find the support needed to maintain a minority viewpoint in the face of majority opposition.[98] At most population levels, the differences between different-sized juries are greater than they are when the probability that a single minority juror will be selected is at issue. If Asch's theory is correct, these data suggest that juries of twelve should hang substantially more often than juries of six, because minority members will more frequently find support for their dissenting viewpoints. Zeisel reports that this is in fact the case; 2.4 per cent of 290 six-member criminal juries hung compared to 5 per cent of the twelve-member juries in a larger national sample.[99]

This is a difference that even the most ardent advocate of the six-member jury should be able to discern. However, in terms of general policy the implications of this difference are far from clear. It is not obvious that the forces that cause juries to hang generally support values important to the legal system. Whether they do would depend on which minorities hang juries and why. Without knowing this it is impossible to say whether hung juries are worth the expense, delay, and uncertainty they involve. If minorities that hang juries tend to be irrational, prejudiced, or corrupted, the differential rates of jury hanging argue in favor of smaller juries. If, on the other hand, minority holdouts represent an element of community opinion particularly concerned that guilt be established

98. This does not mean that the minority will necessarily maintain their dissenting viewpoint permanently. They may be persuaded by rational arguments or capitulate under the pressure of having to defend a distinctly unpopular position over a long period of time. *See* C. Hawkins, *supra* note 32, at 122-50; Note, *supra* note 90, at 107-17. What it does mean is that without initial support there is little or no chance that a single minority juror will hold out against the majority. Kalven and Zeisel report that, of 155 actual jury trials they studied, in no case did a jury with only one initial dissenter fail to reach a verdict. The American Jury, *supra* note 7, at 462.

99. Zeisel, *supra* note 8, at 720. The 290 cases are post-1968 cases from the Miami Circuit Court in Florida; the national sample reports data collected much earlier for The American Jury, *supra* note 7. It does not appear likely that the time difference in data collection calls these results into question because there is no reason to believe that the rate of hung juries has decreased over the years. The nonrandom nature of the sample of cases reported in *The American Jury* might distort the national hung-jury rate, but there is no reason to expect that this is so. There is one puzzle in Zeisel's reported figure for the national sample, however. It is cited to page 56 of *The American Jury*, but on this page the hung-jury rate is reported to be 5.5 per cent, and not 5 per cent as reported in Zeisel, *supra*. If this is simply the result of a misprint in the article, the actual differences in hung-jury rates probably are greater than those reported in the text. Indeed, Kalven and Zeisel suggest that even the 5.5 per cent hung-jury rate they have calculated is likely to be an underestimate. The American Jury, *supra*, at 57 n.2.

TABLE TWO

PROBABILITY THAT AT LEAST A CERTAIN NUMBER OF JURORS WILL BE CHOSEN WITH A PARTICULAR CHARACTERISTIC WHEN THAT CHARACTERISTIC IS SHARED BY GIVEN PERCENTAGES OF INDIVIDUALS IN THE POPULATION FROM WHICH JURORS ARE DRAWN

Percentage of individuals sharing characteristic in the population	Probability of 2 or more out of 6	Probability of 2 or more out of 12	Probability of 4 or more out of 12
85-100%	1.00	1.00	1.00
80	.998	1.00	1.00
75	.995	1.00	1.00
70	.989	1.00	.998
65	.978	1.00	.994
60	.959	1.00	.985
55	.931	1.00	.964
50	.891	.997	.927
45	.836	.992	.866
40	.767	.980	.775
35	.681	.953	.653
30	.580	.915	.507
25	.466	.842	.351
20	.345	.725	.205
15	.224	.557	.092
10	.114	.341	.026
5	.033	.118	.002
0	0.00	0.00	0.00

beyond a reasonable doubt, or if they represent elements that do not share popular prejudices or misguided perceptions, their presence fosters the integrity of the trial process, and the data on hanging argues in favor of larger juries. My own hunch is that hanging minorities are of the latter sort, because I regard the perspectives of the minorities most visible in the community (*e.g.*, black people) as legitimate ones to bring to the jury room. Clearly there is a need for systematic analysis of the way minorities behave in the deliberative process.

There can be no doubt, however, that the interests of the parties to a case are differentially affected by the probability of a hung jury. Hung juries generally aid defendants. In a criminal case tried to a jury that hangs, the defendant remains unconvicted, has a chance that the prosecution will be dropped (a result that seems particularly likely if the jury favored acquittal), has had discovery of the prosecution's case, and will often be in a better position to plea bargain. In civil actions, defendants typically have "deeper pockets" than plaintiffs and are less in need of an immediate decision; thus, they are likely at a minimum to be placed in a substantially stronger bargaining position because of the delay that a new trial entails. One may argue the relative merits of giving defendants such ad-

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vantages, but it appeared until *Williams* and *Colgrove* that the sixth and seventh amendments had foreclosed such arguments. These amendments apparently were intended to preserve the benefits that arise from having one's case tried to a jury rather than to a judge. One such benefit is the possibility of no verdict, an impossible result in completed bench trials. The Supreme Court ignored the matter of the hung jury in *Colgrove* and assumed away any difficulties in *Williams*.[100]

Column three of Table Two gives the probability of selecting at least four members of a twelve-member jury who share a particular perception or attitude from a population in which a given percentage of individuals share the same perception or attitude. In general, the probability of drawing at least four minority members out of twelve is somewhat less than the probability of drawing at least two out of six. Misreading Kalven and Zeisel, the Court in *Williams* thought that four dissenters would be needed on a twelve-member panel to provide the same probability of holding out or reversing the majority as two dissenters on a panel of six.[101] In his response to *Williams*, Zeisel pointed out that a key finding of the Asch experiments was that a second nonconformer was sufficient to break the hold of even a very large majority.[102] Zeisel's statistics

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100. It is true . . . that the "hung jury" might be thought to result in a *minimal* advantage for the defendant, who remains unconvicted and who enjoys the prospect that the prosecution will eventually be dropped if subsequent juries also "hang." . . . But when the comparison is between 12 and six, the odds of *continually* "hanging" the jury seem slight, and the numerical difference in the number needed to convict seems unlikely to inure perceptibly to the advantage of either side.

Williams v. Florida, 399 U.S. 78, 101 n.47 (1970) (emphasis added).

In this quote the Court, after grudgingly acknowledging the defendant's advantage, misstates the issue. The defendant does not have to hang the jury *continuously* to gain advantages from a jury's failure to decide. Once is enough for some advantages, and very few cases are tried more than twice. Moreover, the Court, lacking data, apparently assumes that the difference between the probabilities of hanging a jury of six and a jury of twelve is slight. In fact, if Zeisel's data can be accepted, a jury of twelve is more than twice as likely to hang as a jury of six. In absolute terms, out of every 100,000 criminal trials there will be 2600 more hung juries if juries of twelve are used rather than juries of six. Kalven and Zeisel present some data that indicate that in almost two thirds of hung-jury cases the jury will have hung with a majority for conviction, THE AMERICAN JURY, *supra* note 7, at 460, but their sample size is so small that the reliability of these findings standing alone is questionable. The findings are corroborated, however, by the further finding with a much larger sample that in 80 per cent of the cases in which the jury hangs the judge would vote to convict, and in 79 per cent of the cases (hung juries excluded) in which the judge would convict the jury agrees. *Id.* at 56. Thus, it would seem that in a substantial majority of criminal cases in which the jury hangs, the defendant has avoided an immediate conviction.

101. 399 U.S. at 101-02 n.49.

102. Zeisel, *supra* note 8, at 719-20.

on hung juries[103] are predictable from Asch's findings,[104] but they would be surprising if the Court's "proportionality hypothesis" held.[105]

D. *Interverdict Stability*

Thus far the statistical analysis indicates that twelve-member juries are more likely than six-member juries to contain individuals who represent various minority groups and viewpoints. To the extent that the contributions of such individuals to the deliberative process are valuable, one would expect that where verdicts conflict, those of twelve will be "better." The statistical analyses presented below will suggest that the decisions of twelve-member juries are also likely to be "better" in two other respects. The decisions of twelve are likely to be more consistent across similar cases, and are more representative of the community in that they are more likely to reflect the decisions that would prevail if the entire community could judge the trial for itself.

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103. *See* text at note 99 *supra*.

104. *See* text at notes 91-94 *supra*.

105. In an important recent article, Moscovici and Faucheux indicate that the conformity effects reported by Asch and others might depend on the consistency with which the experimenter's confederates report their results, rather than on the fact that they are in the majority. Moscovici & Faucheux, *Social Influence, Conformity Bias, and the Study of Active Minorities*, 6 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 149 (1972). In support of this proposition, they present their own findings with a color perception problem in which a consistent minority of two were able to influence the views of four naïve subjects on the location of the border between blue and green. These results should not be seen as surprising; to some extent they were anticipated in Asch's early experiments in the less ambiguous line-judging context. Asch found, in a result that is cited only infrequently, that when one confederate in a group of sixteen made consistently wrong judgments on the line problem he was ridiculed; when as many as three of sixteen made consistent mistakes the ridicule changed to agitation, as the naïve subjects took them quite seriously. Asch, *supra* note 71, at 198. It is also interesting to note that Moscovici & Faucheux, *supra*, at 194-95, report that the degree of influence of their consistent minority was about the same as the influence of Asch's majority when one confederate broke ranks and gave true reports.

The work of Asch and his followers and the research of Moscovici and Faucheux are inapposite to the jury situation in that the experimenter determines that some individuals will remain firm in their judgments despite the arguments of others. Jurors are not committed to consistency; consistency depends on the views they present, the views of others, and on their ability to persuade or their vulnerability to persuasion on the matter in issue. The most relevant research in this area is C. Hawkins, *supra* note 32. Hawkins, working with real jurors and tape-recorded trials, found that when jury deliberation revealed the existence of opposing factions, the factions as groups were expected to take about an equal amount of time in presenting arguments for the positions they espoused. Where a split is eight to four, for example, the four minority members have to do about the same amount of talking as the eight in the majority. In these circumstances one or more members of the minority often will be unable to keep up his end of the argument and may switch to the majority. A switch, of course, puts more pressure to participate on the remaining minority members and suggests that the minority position is less consistently held, which,

The proposition that the verdicts of a group of twelve-member juries will be more consistent than those of a group of six-member juries rests on the assumption that jurors often attempt to resolve their differences by compromise, a process that tends toward the average of individual judgments. The argument thus applies most directly where the matter in issue is easily averaged—where the case involves money damages, for example—but it might also apply where a jury must resolve multiple counts or choose the appropriate level of an offense.[106]

Professor Zeisel has provided a good illustration of size effects in this context.[107] Imagine a situation in which a damage action was tried to all the members of a community, and assume that the community was split on the damage issue: One sixth of the population felt that an appropriate award was $1000, one sixth felt that it was $2000, and so on by $1000 intervals up to the most generous one sixth, who felt that damages should be $6000. If differences were then compromised by averaging the individual judgments, the final verdict would be for $3500. If instead a jury was drawn from the community and their judgments averaged, it is likely that the final judgment would differ somewhat from $3500. Zeisel has calculated

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following the thesis of Moscovici and Faucheux, should further increase the pressure on the minority to conform.

Although Hawkins worked only with twelve-member juries, one might argue that the pressure on two in six to talk approximates the pressure on four in twelve. In both cases the average minority member is expected to talk about twice as frequently as the average majority member. Thus, defections and fatigue should reduce the apparent consistency of the minority about as much in the smaller jury as in the larger, and the Court's proportionality hypothesis might hold.

There are at least two problems with this argument. One is that four-member minorities have certain advantages over two-member minorities even if they are opposed by majorities that are proportionately as large or larger. A four-member minority provides a greater opportunity for the members to relieve each other, so that each minority member will have more time to relax and think before it is again his turn to speak. Also, some individuals have personalities that make extended argumentation particularly distressful. While a four-member minority might tolerate such an individual, his presence as part of a two-member minority would place the entire burden of the defense on his colleague. The second difficulty with the argument is its failure to explain the figures that suggest that six-member juries hang about half as often as twelve-member juries. *See* note 99 *supra* and accompanying text. If the proportionality hypothesis held, for whatever reason, the hanging rates of six- and twelve-member juries should be about the same. This suggests that an approach such as Asch's, which emphasizes the absolute number of dissenters rather than the proportion of the dissenters to the majority, provides a better explanation of what goes on in the jury room.

106. *See* Zeisel, *supra* note 8, at 716-21. For an experiment that clearly shows that jurors attempting to reconcile conflicting damages estimates average their individual estimates, see C. Hawkins, *supra* note 32, at 57-66. Hawkins used actual jurors in three cities who were near the end of their term of service.

107. Zeisel, *supra* note 8, at 716-18.

that if six-member juries were drawn in these circumstances, fifty-one per cent of the verdicts would be for between $3000 and $4000, while sixteen per cent of the verdicts would be for more than $4500 or less than $2500. If twelve-member juries were drawn, sixty-eight per cent of the verdicts would fall between the first two figures while only four percent would fall outside the latter two amounts. The greater proximity of twelve-member jury verdicts to the average judgment of the community from which they are drawn means that damages awarded by two different juries to two plaintiffs suffering similar injuries are likely to be closer in amount if the juries each have twelve members than if they each have six. In a legal system that values the similar treatment of individuals in like circumstances, this result argues in favor of the twelve-member jury.[108]

E. *Representing the Community*

Where averaging processes are inappropriate, as with the choice between a verdict of guilt or innocence on a single count,[109] there is another sense in which the verdict of the twelve-member jury is more likely to be representative of the community judgment than that of the six-member jury. Assume that in the imaginary trial for damages described above, the community members are asked to decide liability or no liability by a preponderance of the evidence.[110] In the trial situation, where one can rarely be absolutely certain that

108. It is impossible to state, however, what this difference in proximity means in dollar terms. This would depend on the distribution of individual judgments before the deliberations proceed to an averaging process and on the weight that would be given to individual views. Zeisel comments that whatever the final distribution of awards, the variation in the judgments of the six-member juries as measured by the appropriate statistic, the standard deviation, will be about 42 per cent greater than the variation with juries of twelve. *Id.* at 718. But this probably overstates the difference because it assumes that all will contribute equally to the averaging process and that averaging procedures will be mathematically precise. Participation tends to be more equal in smaller groups, *see* text at notes 145-51 *infra*; thus, the average verdict of a six-member group may reflect the more or less equal input of five members with the views of one ignored, while the verdict of a twelve-member jury might reflect similar inputs from nine with three members effectively excluded. Even when all jurors contribute, the averaging process may be only a loose one. *See, e.g.*, C. Hawkins, *supra* note 32, at 57-66. Of course, if the jury adopts some formal means of assuring equal inputs, such as the forbidden but not unknown quotient verdict, Zeisel's analysis of magnitude applies and the argument holds precisely.

109. Even in this case there may be some room for averaging, as when one juror argues that 95 per cent certainty is necessary for conviction beyond a reasonable doubt, another argues in favor of 85 per cent certainty, and they compromise at 90 per cent certainty. This occurrence, however, seems unlikely. Hawkins found no indications of averaging on issues other than liability. *See* C. Hawkins, *supra* note 32, at 104-50. *But cf.* Zeisel, *supra* note 8, at 721.

110. The following analysis would also apply where the jury is deciding guilt or innocence and the standard is "beyond a reasonable doubt."

a particular verdict is correct, one might argue that the most appropriate jury verdict would be the one that reflects the considered judgment of a majority of the community. Part A of Table Three presents the probabilities by jury size that a majority of the jury will favor the plaintiff for given divisions of community opinion. Part B[111] assumes that when juries are divided equally on the first ballot, all ties will be subsequently broken, with defendants and plaintiffs having an equal chance of prevailing. Accepting this assumption, and assuming that juries always decide in the direction of their first majority, Part B presents the probability of plaintiff verdicts for given divisions of community opinion.[112]

TABLE THREE

PART A

PROBABILITIES FOR JURIES OF SIX AND TWELVE THAT A MAJORITY OF THE JURY WILL VOTE INITIALLY FOR THE PLAINTIFF WHEN GIVEN PERCENTAGES OF THE COMMUNITY FROM WHICH THE JURY IS DRAWN WOULD VOTE FOR THE PLAINTIFF

Per cent of community that would vote for plaintiff	0	10	20	30	40	50	60	70	80	90	100
Probability that at least 4 out of 6 would vote for plaintiff	.00	.00	.02	.07	.18	.34	.54	.74	.90	.98	1.00
Probability that at least 7 out of 12 would vote for plaintiff	.00	.00	.00	.04	.15	.39	.67	.88	.98	1.00	1.00

PART B

PROBABILITIES FOR JURIES OF SIX AND TWELVE THAT A MAJORITY OF THE JURY WILL VOTE EVENTUALLY FOR THE PLAINTIFF WHEN GIVEN PERCENTAGES OF THE COMMUNITY FROM WHICH THE JURY IS DRAWN WOULD VOTE FOR THE PLAINTIFF. (ASSUMES JURORS DO NOT SWITCH VOTES WHEN THERE IS AN INITIAL MAJORITY, BUT WHEN THERE IS NO INITIAL MAJORITY THE TIE IS EVENTUALLY BROKEN WITH AN EVEN CHANCE THAT IT WILL BE BROKEN IN FAVOR OF THE PLAINTIFF)

Per cent of community that would vote for plaintiff	0	10	20	30	40	50	60	70	80	90	100
Probability that at least 4 out of 6 would eventually vote for plaintiff	0.00	.01	.06	.16	.32	.50	.68	.84	.94	.99	1.00
Probability that at least 7 out of 12 would eventually vote for plaintiff	0.00	.00	.01	.08	.25	.50	.75	.92	.99	1.00	1.00

111. Part B is taken from Note, *supra* note 8, at 546. The interpretation given to these figures, however, differs somewhat from the interpretation given by the author of the Note.

112. *See id.* at 542-44; note 32 *supra* and accompanying text. Of course, it is possi-

Part A reveals that in a situation in which only twenty per cent of the community would decide for the plaintiff, two out of one hundred six-member juries would have a pro-plaintiff majority compared to less than one out of one hundred twelve-member juries. Where thirty per cent of the community favors the plaintiff, six-member juries are almost twice as likely as twelve-member juries to have a pro-plaintiff majority. Where the community is equally divided or a small margin favors the defendant, the twelve-member jury is more likely to have a pro-plaintiff majority because the number of jurors needed for the majority, seven, is a smaller fraction of twelve than four is of six.[113]

Justice White, writing for the majority in *Williams*, found "little reason" to think that a six-member jury would, in any "meaningful" sense, be less representative of a given community than a jury of twelve.[114] But the results presented in Table Three, as well as the analysis of jury decision-making on the issue of damages, suggests that Justice White is either wrong in his intuitive analysis or that he used the word *"meaningful"* in a very different sense than I do.[115]

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ble that some juries with initial majorities will hang; however, this possibility is more than counterbalanced in Part A of the Table by the fact that equal initial divisions are not partially credited to pro-conviction majorities, although initially split juries will sometimes decide to convict. For a justification of crediting equal splits to defendants and plaintiffs equally, see Note, *supra* note 8, at 545-46 nn.62, 63. Part B does not take account of the possibility of hanging, but hung juries are a relatively rare event with twelve and even rarer with six. *See* text at note 99 *supra*.

113. Figures associated with community proportions that add to 100 per cent do not themselves add to 100 per cent in Part A of Table Three because situations in which the jury is equally divided are excluded from these calculations. When these figures are included and divided equally, as in Part B, the results are symmetrical and do add to 100 per cent.

114. Williams v. Florida, 399 U.S. 78, 100 (1970).

115. In fairness to Justice White, it should be pointed out that the evidence from THE AMERICAN JURY, *supra* note 7, justifying the conclusion that the jury almost always decides in the direction of an initial majority may be based largely on cases that are relatively clear, in which 90 per cent of the community would decide the same way. The majority in such cases almost certainly coincides with community feeling, and this would probably be true if juries were reduced to six. It may even be that cases in which small initial minorities hang or in which juries reverse an initial vote are disproportionately cases in which the views of the jury's minority coincide with the views held by a community majority. However, as the discussion of Asch's research suggests, such an effective minority is more likely to be found on a twelve-member jury than on a jury of six. *See* text at notes 91-99 *supra*. Further limiting this defense of White's position is the finding from one experimental study using a case that apparently was close (35 per cent of the experimental juries hung and the initial pre-deliberation vote was 67 to 33) that 74 per cent of the cases with an initial majority that reached a verdict agreed with the initial majority view. In only 15 per cent of all cases did the jury hold against an initial majority position. *See* C. Hawkins, *supra* note 32, at 145. Simon, working experimentally with another apparently close case, reports that in only 9 per cent of all cases and 11 per cent of those cases reach-

Table Three illustrates one more important point. The representative advantage of the larger jury is, except at and slightly below a fifty per cent community division, unbiased; the twelve-member jury is more likely than the six-member jury to have a pro-plaintiff majority when a majority of the community would favor the plaintiff and it is more likely to have a pro-defendant majority when a majority of the community would favor the defendant. Thus, if the community's judgment is the standard, the quality of decisions rendered by twelve is likely to be higher than the quality of those of six regardless of which party has the better case.

This suggests that in *Williams* the Supreme Court missed an opportunity to promote the integrity of jury trials generally and ignored the perspective of the larger community. The Court apparently felt that if an alleged pro-defendant benefit from trial by twelve in criminal cases was offset by an equally likely pro-prosecution benefit, the benefits canceled and there was no cause for striking down the six-member jury. Thus, the Court never considered the important possibility that the allegedly offsetting benefits *both* worked to promote the quality of jury decisions generally.[116] Although the sixth amendment gives rights to the defendant, it does not follow that these rights were not in part given to enhance the interest of the larger community in correct verdicts. The Court might have considered the relationship of jury-size differences to the common good, but it did not.

F. *Research That Favors Twelve*

Thus far I have used the social-psychological literature only to justify certain assumptions or to form a basis for making inferences about the consequences of particular statistical distributions. But one might ask a more ambitious question: Is there reason to believe

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ing a consensus did the jury decide in favor of an initial minority. R. SIMON, *supra* note 32, at 117.

116. Justice White responded to the suggestion that the twelve-member jury gives the defendant a greater advantage because he is more likely to find one juror who will insist on acquittal and prevent conviction with the argument that it is equally likely that the advantage will accrue to the state, because there is a greater chance that it will find one conviction-prone juror who will prevent acquittal. One might try to justify the Court's attitude by arguing that it was a defendant who was appealing in *Williams* and not the public generally; hence, if the defendant's interests are not hurt, he has no cause to complain and the Court no cause to act. This position, however, would be sensible only if the sole purpose of the sixth amendment was to promote the interests of defendants as a class, without regard to the public interest. Even if this interpretation were sound, it should not have been relied upon in *Williams* because there the defendant had already been convicted; had his trial been before twelve instead of six the additional jurors could have only helped him.

that decisions of twelve-member juries are likely to be of a generally higher (or lower) quality, in terms of the dynamics of decision-making, than decisions rendered by juries of six? Social-psychological literature on the relationship between group size and the quality of group decision-making bears on this question. Although the methodology of the group-size research limits its relevance for the jury problem,[117] the available studies do provide information on the ways in which size can affect the quality of group decisions, suggest tactics for experimentation in more realistic settings, and illustrate how laboratory research may bear on a practical legal problem.

Thomas and Fink summarize the findings of thirty-one studies in which group size was an important variable by stating: "[I]t appears that both quality of group performance and group productivity were positively correlated with group size under some conditions, and under no conditions were smaller groups superior."[118] This conclusion holds generally, but the literature does not appear to justify Thomas and Fink's confidence that this will *always* be the case. Most apparent reasons for the superiority of large groups over small groups, and of all groups over individuals, derive from the participation of a greater number of individuals with more diverse viewpoints in the problem-solving effort. Thus, larger groups do better on problems where the quality of the group solution can be

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117. *See* text at note 70 *supra*.

118. Thomas & Fink, *Effects of Group Size*, 60 PSYCH. BULL. 371, 373 (1963). Studies supporting this conclusion either directly, by indicating that larger groups are better than smaller groups in terms of the quality of their decision-making, or inferentially, by indicating that groups have advantages over individuals in ways that suggest that large groups have advantages over smaller groups, include: Faust, *Group Versus Individual Problem-Solving*, 59 J. AB. & SOC. PSYCH. 68 (1959); Fox, Lorge, Weltz & Herrold, *Comparison of Decisions Written by Large and Small Groups*, 8 AM. PSYCHOLOGIST 351 (1953); Gibb, *The Effects of Group Size and of Threat Reduction upon Creativity in a Problem Solving Situation*, 6 AM. PSYCHOLOGIST 324 (1951); Goldman, Dietz & McGlynn, *Comparison of Individual and Group Performance Related to Heterogeneous-Wrong Responses, Size, and Patterns of Interaction*, 23 PSYCH. REP. 459 (1968); Hall, Mouton & Blake, *Group Problem Solving Effectiveness Under Conditions of Pooling vs. Interaction*, 59 J. SOC. PSYCH. 147 (1963); Hoffman & Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, in CURRENT STUDIES IN SOCIAL PSYCHOLOGY 458 (I. Steiner & M. Fishbein eds. 1965) [hereinafter CURRENT STUDIES]; Porter, *Information Distribution and Group Size: Some Effects on Group Problem Solving*, 4 INDUS. MANAG. REV. 1 (1963); Steiner, *Models for Inferring Relationships Between Group Size and Potential Group Productivity*, 11 BEHAV. SCI. 273 (1966); Taylor & Faust, *Twenty Questions: Efficiency in Problem Solving as a Function of Size of Group*, in SMALL GROUPS 513 (A. Hare, E. Borgatta & R. Bales eds. 1965); Tuckman & Lorge, *Individual Ability as a Determinant of Group Superiority*, in CURRENT STUDIES, *supra*, at 409; Watson, *Do Groups Think More Efficiently than Individuals?*, 23 J. AB. & SOC. PSYCH. 328 (1928). *But see* Hackman & Vidmar, *Effects of Size and Task Type on Group Performance and Member Reactions*, 33 SOCIOMETRY 37 (1970); Hare, *A Study of Interaction and Consensus in Different Sized Groups*,

measured by the simple sum of the contribution of all members.[119] Larger groups also surpass smaller groups in solving "eureka" type problems: problems in which insightful solutions seen by one group member may be easily explained to others.[120] Obviously the likelihood that one member will perceive the solution increases with group size.

Problems faced by jurors are seldom of the "eureka" type. A kind of "summing" does occur, however, when individual judgments are added and averaged, as is probably the case with many tort damage awards.[121] Small-group research suggests that in many problems involving quantitative estimation, such as judging the number of beans in a jar, the average judgments of statisticized groups[122] tend better to approximate correct answers than average individual judgments.[123] The group's advantage appears especially great when the problem involves unfamiliar material or when opinions as to the correct solution vary widely. Group superiority seems to depend entirely on the fact that averaging larger numbers of estimates reduces error variance; hence larger groups would have an advantage over smaller groups in dealing with such problems.[124]

Larger groups also do better than smaller groups where crucial inputs are needed, because different members may make critical contributions at different stages.[125] Thus, if memory is important, a large group is more likely to contain members who recall crucial

17 Am. Soc. Rev. 261 (1952); Holloman & Hendrick, *Problem Solving in Different Sized Groups*, 24 Personnel Psych. 489 (1971).

119. An example is the task of constructing as many words as possible from a set of letters in a given period of time. *See* Watson, *supra* note 118. But larger groups are typically less efficient in such tasks than smaller groups in that the number of words constructed per person per unit of time is less. *Cf.* Hoppe, *Memorizing by Individuals and Groups: A Test of the Pooling-of-Ability Model*, 65 J. Ab. & Soc. Psych. 64 (1962).

120. *See* Hoffman, *Group Problem Solving*, 2 Advances in Experimental Soc. Psych. 99, 111 (1965); Lorge, Fox, Davitz & Brenner, *A Survey of Studies Contrasting the Quality of Group Performance and Individual Performance, 1920-1957*, 55 Psych. Bull. 337 (1958); Kelley & Thibaut, *Group Problem Solving*, in 4 Handbook of Social Psychology 64-65 (2d ed. G. Lindzey & E. Aronson 1969).

121. *See* text at note 106 *supra*.

122. A "statisticized" group is an artificially constructed group of individuals who have never actually deliberated together, and whose judgments are averaged by the researcher.

123. *See* Lorge, Fox, Davitz & Brenner, *supra* note 120, at 344-46.

124. If, for example, relatively objective evidence was presented on the extent to which the amputation of an arm would reduce the future earnings of a truckdriver over a 20-year period, one would expect that the judgments of groups of individuals, on the average, would be closer to the amount actually lost than the judgments of individuals deciding alone. Judgments of larger groups, on the average, should be closer than judgments of smaller groups.

125. *See* Faust, *supra* note 118.

facts at each stage of the problem-solving activity. Thus, larger juries are likely to be superior to smaller juries where memory or a good understanding of facts and instructions is crucial to the deliberative process.[126]

A final strength of the larger group, although really another variation of themes already discussed, lies in its greater heterogeneity. Research indicates that heterogeneous groups are more likely to arrive at correct solutions to problems than homogeneous groups.[127] It has already been demonstrated that increasing the size of a randomly selected group tends to increase the heterogeneity of its membership.[128]

A study by Barnlund is suggestive, although it deals with group-individual differences rather than large-group/small-group differences.[129] Barnlund created student groups that were similar in syllogistic reasoning ability but not in other respects. The subjects were then presented with problems in syllogistic reasoning. Although susceptible to standard techniques of logical resolution, the problems were written so that both premises and conclusions contained references to conservative Republicans, communists, atheists, college professors, and other groups likely to arouse the prejudices of college students. Barnlund found that group solutions were substantially better than those of individuals. Indeed, groups whose members were in the lowest fifth of the class on ability rivaled the performance of the most skilled class members working alone. Group superiority was based on both additive and discussion effects. Predeliberation decisions constructed for each group on the basis of a majority of individual responses were superior to the average of individual products, and group decisions after discussion were significantly superior to these constructed solutions. Barnlund attributed much of the group superiority to the fact that the different prejudices that the problems elicited in different members were counterbalanced. Hence, individuals deliberating in groups were forced to become more objective. He commented: "The significance of this one factor alone would be hard to overestimate."[130] The existence of such

126. *See* Kelley & Thibaut, *supra* note 120, at 69.

127. *See* Goldman, Dietz & McGlynn, *supra* note 118; Hoffman, *supra* note 120; Hoffman, *Homogeneity of Member Personality and Its Effect on Group Problem-Solving*, 58 J. Ab. & Soc. Psych. 27 (1959); Porter, *supra* note 118; Thomas & Fink, *supra* note 118, at 381. *But cf.* Shaw, *A Note Concerning Homogeneity of Membership and Group Problem Solving*, 60 J. Ab. & Soc. Psych. 448 (1960).

128. *See* text at note 75 *supra*.

129. Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. Ab. & Soc. Psych. 55 (1959).

130. *Id.* at 59.

counterbalancing prejudices would, of course, be more likely in a randomly selected group of twelve than in one of six. Barnlund also attributed group success to the fact that membership in the group appeared to increase motivation, to make people more self-critical and thus inhibit mistaken answers, and to provide greater critical resources than those available to individuals working alone.[131] Increased motivation, the first of these factors, is likely to be greater in groups of six than in groups of twelve; with respect to the other two factors, groups of twelve should be marginally superior.

Of course, groups cannot realize the advantages of heterogeneity unless members express different ideas before a final choice is adopted. Lorge and his associates found that the probability that an expressed idea would appear in a group solution was a function of its commonality; ten per cent of the ideas expressed by only one member appeared in the group solution, compared to fifty per cent of the ideas expressed by two or more members.[132] This suggests that the ideas of a minority are less likely to be ignored by a jury of twelve than by a jury of six, although it is possible that ideas must be expressed by proportionately more members in larger groups if they are to receive equal attention.

A leader, by "budgeting" discussion time for members who are alone in their position, can also ensure presentation of minority views. Maier and Solem, asking five- and six-person groups to solve Maier's well-known "horse-trading problem,"[133] found that except when there was an initially large correct majority, the presence of a discussion leader increased the tendency of group members ultimately to accept a correct answer.[134] When the minority was initially correct and there was no group leader, forty-six per cent of the initially incorrect subjects switched to the correct answer. When a discussion leader was appointed, seventy-two per cent of the initially incorrect subjects switched.[135] This suggests that effective leadership may be vital if heterogeneous groups are to realize the full potential of their diversity. Since larger groups are more likely

131. *Id.* at 58.

132. Lorge, Davitz, Fox & Herrold, *Evaluation of Instruction in Staff Action & Decision Making*, USAF Hum. Res. Inst. Tech. Rep. No. 16 (1953).

133. *A* buys a horse for $60. He sells it to *B* for $70. He buys it back from *B* for $80 and resells it for $90. How much if anything has *A* made on the deals? Students usually answer that *A* has made a profit of either $10 or $20. Lawyers, of course, will immediately perceive the correct answer.

134. Maier & Solem, *The Contribution of a Discussion Leader to the Quality of Group Thinking: The Effective Use of Minority Opinions*, 5 Human Relations 277 (1952).

135. *Id.* at 280-81.

to be diverse than smaller groups, skilled leadership may be particularly crucial if twelve-member juries are to perform up to their potential.[136]

Accepting the above evidence on the superiority of decision-making in larger groups, one question remains: Exactly how much better is such decision-making? Gibb, working with individuals and different-sized groups, found that during thirty-minute discussions "creativity," defined in terms of the number of ideas produced, increased as a negatively accelerated function:[137] Each additional member added something to the group's product, but he added somewhat less than his immediate predecessor. Since adding group members generally involves constant or increasing costs, at some point additional members will not contribute enough to the quality of the group decision to justify the additional cost. It is impossible, however, to tell from the write-up of Gibb's study the gains or costs involved in adding group members, and it is generally impossible to draw from the group-decision-making literature any concrete notion of how substantial an advantage a jury of twelve would have over one of six.

G. *Research That Favors Six*

The literature reviewed thus far does suggest that where the decisions of six- and twelve-member groups diverge, the decisions of twelve are likely to be more accurate, more creative, and less bound by prejudice. However, some small-group studies suggest that the larger group is not a better decision-maker, at least not under all conditions. Indeed, some researchers have found groups of five or six to be about the ideal size for group decision-making.[138]

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136. *See* Hare, *supra* note 118, at 262. Also, leadership skill is probably more important in large groups because participation becomes increasingly stratified in such groups, so the leader comes to dominate more and more of the conversation. *See* A. HARE, HANDBOOK OF SMALL GROUP RESEARCH 231 (1962); Bales, Strodtbeck, Mills & Roseborough, *Channels of Communication in Small Groups*, 16 AM. SOC. REV. 461 (1951); Thomas & Fink, *supra* note 118, at 374. A formal leader may mitigate this effect by taking a relatively neutral role and assuring that all get a chance to participate. *Cf.* Hoffman, *supra* note 120, at 108. Leaders also may be important to break down the closeness of a small group and draw out minority opinion that otherwise would be inhibited. *Cf.* Bovard, *Group Structure and Perception*, 46 J. AB. & SOC. PSYCH. 398 (1951); Thomas & Fink, *supra* note 118, at 375. An effort to provide jurors with some training in techniques of discussion leadership might pay substantial dividends.

137. Gibb, *supra* note 118. Gibb worked with groups of sizes 2, 3, 6, 12, 24, 48, and 96. *See also* Lorge, Fox, Davitz & Brenner, *supra* note 120.

138. *See* Frye, Spruill & Stritch, *Effect of Group Size on Public and Private Coalescence, Efficiency and Change*, 62 J. SOC. PSYCH. 131 (1964); Hackman & Vidmar, *supra* note 118, at 48-49; Holloman & Hendrick, *supra* note 118, at 499-500; Rosenblatt & Rosenblatt, *Six-Member Juries in Criminal Cases. Legal and Psychological Considerations*, 47 ST. JOHN'S L. REV. 615, 633 (1973); Slater, *Contrasting Correlates of*

Like the studies favoring larger groups, these studies are hampered by the subjects used, the problems posed, and the range of sizes investigated.

Evidence in the literature indicates at least four areas in which smaller juries might have an advantage over larger ones: (1) Smaller juries are more likely to have members who are satisfied with their jury service and who accept the results of deliberation; (2) coordination problems that may interfere with effective decision-making will be greater in larger juries; (3) deliberation in smaller juries is more likely to reflect the relatively equal participation of all members; and (4) larger juries will tend to divide into factions that may adversely affect the quality of their decisions. My view is that on balance none of these propositions ultimately justifies the conclusion that juries of six are likely to be better decision-makers than juries of twelve, but they all deserve consideration.

The first of these advantages—the greater satisfaction expressed by members of smaller groups—is well documented,[139] but of questionable relevance where the concern is with the quality of decision-making rather than with the feelings of decision-makers. That members are satisfied with their group or with the quality of their decisions does not mean that the group decisions are better in any objective sense. For example, Slater, working with groups of sizes two through seven, has suggested that five is probably the optimal number for solving human relations problems. Members of smaller groups tend to feel that their group is too small for the task, members of larger groups tend to feel that their group is too large, and members of groups of five tend to feel that their groups' size is about right.[140] Slater explains these findings by suggesting that five-person groups are large enough that members feel free to make aggressive efforts toward problem-solving even at the risk of antagonizing others, yet small enough that members feel some regard for the

Group Size, in CURRENT STUDIES, *supra* note 118, at 416. The Holloman and Hendrick study, which found groups of six to be better—although not significantly so—than groups of twelve in predicting the outcome of the movie "Twelve Angry Men" must be discounted because groups were constructed to be homogeneous with respect to ability. This artificial construction vitiates one of the principal advantages of a larger group. In Goldman, Dietz & McGlynn, *supra* note 118, at 461, the authors report that the performance of heterogeneous groups improved with size, but not the performance of homogeneous groups.

139. *See, e.g.*, Hackman & Vidmar, *supra* note 118; Hare, *supra* note 118; Thomas & Fink, *supra* note 118, at 378. Of course, these feelings might be important with respect to other values that the legal system might wish to promote. It is predictable that if jury size were reduced from twelve to six the average satisfaction of individuals with their jury experience would go up.

140. Slater, *supra* note 138, at 418.

needs of others. Slater, however, does not attempt to judge the quality of group decisions. Hackman and Vidmar, working with groups of the same size as Slater's on three different problems, replicated Slater's finding.[141] They also independently analyzed the quality of the group product and found that group decisions tended to be better when made by groups both above and below size five. They suggest that middle-sized groups may be too comfortable for effective task performance, and that the stress engendered by the conflict and coordination problems of larger groups may actually induce better task performance. A related explanation that is supported by some research is that conformity increases as group ties become stronger.[142] Thus, as one feels more comfortable in a group or grows to value his group membership more, the likelihood that he will challenge the dominant group perspective decreases.

Coordination problems do, of course, increase with group size. Where resolution of a problem requires a consistent strategy or coordinated movements, as with certain motor problems or designing a crossword puzzle, group performance is often poorer than that of the best individual member.[143] Smaller groups probably would have an advantage over larger groups in such situations. Jury-type problems, however, are unlikely to place such a high premium on coordination. Fox and his associates, for example, report that when 400 air force officers were given thirty minutes to solve a complex human relations problem, groups of twelve and thirteen produced solutions superior to those reached by groups of six through eight.[144] These officers probably had an advantage over the ad hoc groups typically studied by social-psychologists and over juries in that pre-existing rank differences could ease coordination problems. However, juries have an offsetting advantage in that they need not render verdicts within a particular length of time, and the selection of a foreman aids in organization. Coordination difficulties might force juries of twelve to take longer to reach verdicts than juries of six, but there is no reason to expect that the solutions finally reached would be inferior.

The increased inequality of participation in larger groups is a third factor that implies that smaller juries might be superior to

141. Hackman & Vidmar, *supra* note 118, at 48-49.

142. *See* Bovard, *supra* note 136; Deutsch & Gerard, *supra* note 96; Dittes & Kelley, *Effects of Different Conditions of Acceptance upon Conformity to Group Norms*, 53 J. Ab. & Soc. Psych. 100 (1956); Kidd, *supra* note 93. *Cf.* Bales, *The Equilibrium Problem in Small Groups*, in Small Groups, *supra* note 118, at 444.

143. *See* Kelley & Thibaut, *supra* note 120, at 69-70, 74-75.

144. Fox, Lorge, Weltz & Herrold, *supra* note 118.

larger ones. The normative model of the jury process suggests that each juror should contribute to the deliberations, and there is some evidence in the small-group literature that highly skewed participation will adversely affect decision-making. Hare, for example, reports that when boy scouts were asked to rank the relative usefulness of various pieces of camping equipment, the most influential boy in groups of five was the one with the most camping experience; the most influential boy in groups of twelve was the one who talked the most.[145] In a review of the literature, Hoffman cites additional evidence that the individual who talks the most will have the greatest impact on group problem-solving.[146] He reports an experiment by Riecken that indicates that groups rarely adopt "elegant" solutions when their proponents are the least talkative members of the groups, but almost always adopt them when their proponents are the most talkative members.[147] Hoffman suggests that the most self-confident members may prevent a group from using all of the information available because they so dominate discussion that they can focus attention on matters they think important.[148] Hoffman also feels that the disproportionate influence of the most self-confident group member will increase with the size of the group, because potential dissenters will grow increasingly reluctant to voice their opinions for fear of being thought deviant.[149] This last observation, at least, is somewhat questionable; Thomas and Fink among others suggest that smaller groups tend to inhibit disagreement because of their greater solidarity.[150]

The findings of Hare and Hoffman, if applicable in the jury setting, would imply that the decision-making advantages that the twelve-member jury enjoys by virtue of the greater heterogeneity of its membership would be more or less canceled during the deliberation process. If members do not contribute to the group decision, the fact that they have unique ideas and values means

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145. Hare, *supra* note 118.

146. Hoffman, *supra* note 120, at 105-07.

147. *Id.* at 105, *citing* Reicken, *The Effect of Talkativeness on Ability To Influence Group Solutions of Problems*, 21 SOCIOMETRY 309 (1958). There is also evidence that high participators exercise disproportionate influence in a jury setting. Strodtbeck and his associates report that individuals who participated more expressed greater satisfaction with the deliberation and shifted their position less often in the process of arriving at a verdict. Other jurors also disproportionately reported high participators as being helpful in reaching a verdict. Strodtbeck, James & Hawkins, *supra* note 70, at 3-11.

148. Hoffman, *supra* note 120, at 107.

149. *Id.*

150. Thomas & Fink, *supra* note 118, at 375. *See also* studies cited note 142 *supra*.

little. Although the arguments that favor this conclusion are reasonable, close evaluation of available evidence suggests that such cancellation effects do not occur to any great extent. Even though low participators in a group of six can be expected to participate more than low participators in a group of twelve,[151] the advantages of the increased heterogeneity of the larger group should not be substantially diminished.

With respect to the danger that a single member will dominate the decision-making, the careful research of Bales and his associates indicates that in groups of six working with a human relations discussion problem, the most active member will be responsible for about forty-three per cent of the interaction initiated and the next most active member for about nineteen per cent.[152] In twelve-member juries the evidence implies that the degree to which one member dominates conversation will be substantially less. Strodtbeck and his associates found that jury foremen, the most active jury participants, initiated only about a quarter of the interaction, and tended to take a neutral rather than a partisan position on a damage issue.[153] Bevan and his associates found that even high status jury foremen who had been instructed to dominate discussion had only limited success in raising the jury damage award to a target set by the experimenter.[154] Thus, increasing jury size from six to twelve does not necessarily cause the jury to become increasingly dominated by one or two persons; indeed, it seems likely that such an increase would reduce the absolute participation of the leading participator, although the extent to which the leader's participation proportionately exceeds that of other jurors might be unaffected or increase.

Low participators in a larger group, on the average, do participate less by percentage than low participators in a smaller group, but this difference is in part artifactual. Assuming equal participation by each member, the percentage participation of members of a larger group will always be less than the percentage participation of members of smaller groups, simply because there are more members to share the time.[155] Where there is no fixed time limit on discussion, as in the jury setting, low percentage participation does not

151. *See* A. HARE, *supra* note 136, at 232.

152. *See* Bales, *supra* note 142, at 458.

153. Strodtbeck, James & Hawkins, *supra* note 70, at 716.

154. Bevan, Albert, Loiseaux, Mayfield & Wright, *Jury Behavior as a Function of the Prestige of the Foreman and the Nature of His Leadership*, 7 J. PUB. L. 419 (1958).

155. Diamond, *supra* note 12, at 526-27, makes this same point in her reanalysis of the data presented in Note, 6 U. MICH. J. L. REF. 712, *supra* note 4.

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necessarily mean that an individual has been unable to make all of the points that he thinks important. Indeed, even the comment, "I don't understand" may be helpful if it forces other members to clarify their arguments.[156]

A second reason why average participation rates of low participators might be less on twelve-member juries than on juries of six is that larger jury size increases the probability that the argument or insight one was going to offer will be offered first by another. Thus, an individual who finds high participation personally uncongenial may be able to withdraw substantially from a twelve-member discussion without depriving the group of ideas or information.[157]

Of course, it is also possible that those who withdraw from discussion on a twelve-member panel do have original arguments and ideas but are intimidated from presenting them by the size of the group they face. Hawkins, however, found that when a jury was divided into factions, the minority faction initiated substantially more than its proportionate share of the conversation.[158] Majority factions apparently place considerable pressure on minorities to defend their positions. In this setting, Hawkins found that minority jurors generally increased their participation, and the increase was likely to be quite substantial if the individual ultimately found himself a minority of one.[159] This suggests that, even on a larger jury, recalcitrant members will participate when no other member makes their arguments.[160]

A final factor that mitigates any advantage smaller juries might

156. Barnlund states that such professions of limited understanding helped his groups in their task of syllogistic reasoning. Barnlund, *supra* note 129, at 58.

157. Social status is noticeably associated with participation in the twelve-member jury. Hawkins found that, after excluding the foreman, college-educated individuals were responsible for about 9.8 per cent of the total participation, while those with only grammar school educations were responsible on the average for about 5 per cent of the participation. Controlling for occupation as well, the range was from college-educated proprietors, who averaged 13.5 per cent, to grammar-school laborers with an average participation level of 3.7 per cent. C. Hawkins, *supra* note 32, at 37, Table 9. Thus, those on the jury more used to resolving problems verbally may do most of the talking. If high-status groups are more capable than members from low-status backgrounds in dealing with jury-type problems, these status effects may improve the final product of the deliberations.

158. C. Hawkins, *supra* note 32, at 123-37. For evidence of the same phenomenon, see Diamond, *supra* note 12, at 525.

159. Of course, in this setting members in the majority direct their arguments to the one dissenter and call on him to respond. Individuals in factions of two or more may refrain from expressing persuasive arguments, allowing their allies to express less persuasive ones. *See* C. Hawkins, *supra* note 32, at 136-37.

160. Where jurors are alone in the minority, the increased pressure to participate makes holding out quite difficult. The lone dissenters who succeeded in hanging Hawkins' juries apparently did so by withdrawing or making a mockery of the deliberations. *Id.* at 135-37.

have in encouraging more widespread participation is that on an absolute basis, larger size means that more viewpoints are likely to be represented, even if more views are also suppressed. In her law review note, Kessler reports that participation was unanimous in six of eight experimental six-member juries, compared to only one of eight twelve-member juries.[161] However, no twelve-member jury had fewer than seven participants, and six of the eight had nine or more participants.[162] Moreover, these results unquestionably underrepresent the breadth of participation on twelve-member panels. Either Kessler's student jurors were generally unmotivated or her experimental case was too easy or both, for only five of her panels, including just one twelve-member jury, took longer than twenty minutes to reach a decision.[163] Simon, by contrast, reports that cases in which all twelve jurors did not contribute at least one comment were unusual.[164] Hawkins' research suggests that the organization of the deliberation process may promote full participation. Jurors frequently seek to determine where their jury stands by the use of open polls, a tactic that not only forces jurors to reveal their views but may give each juror a structured opportunity to explain his position.[165]

The final and most intriguing argument for the superiority of decision-making by smaller juries is based on Hawkins' doctoral dissertation, part of the Chicago Jury Project. Hawkins monitored forty-six twelve-member juries deliberating mock tort actions. Jurors were citizens who had actually been called to duty in the federal district court. Hawkins was able to distinguish between two quite different modes of proceeding, one of which he called "deliberating in unity" and the other "deliberating in factions."[166] When jurors deliberate in unity, they seek to resolve issues without the use of advocates. Jury members may present arguments for either party, and the decision, which emerges from the bulk of facts and evaluations, cannot be traced to any particular person or set of persons.[167] When jurors deliberate in factions, collective opinion, instead of

161. Note, 6 U. MICH. J. L. REF. 712, *supra* note 4, at 731.

162. *Id.*

163. *Id.* at 725.

164. R. SIMON, *supra* note 32, at 244 n.9. Simon was working with real jurors on a mock case. She studied 98 juries, but her comment may be based only on 39 cases in which deliberations were transcribed. In any case, her experiment was more sophisticated in its design than Kessler's, presented more difficult issues to the jury, and had the advantage of real jurors. All these factors should make her results more reliable.

165. *See* C. Hawkins, *supra* note 32, at 74-82.

166. *Id.* at 106-10.

167. *Id.* at 107.

being a product of discussion, is a product of preexisting personal opinions. Members argue in favor of preferred outcomes and unite with other members who share their goals, without regard to the others' reasons. Discussion is organized into an exchange of speeches by advocates. Those in a faction are more concerned with the effectiveness with which the other side is being attacked than with the arguments put forth to attack them. While deliberation in unity can involve all jurors, deliberation in factions involves what are really just two "individuals" or subgroups.[168]

Hawkins recognizes that these descriptions are "ideal types" and that actual jury deliberations will often have some of the characteristics of one and some of the other. However, the description of the ideal types indicates Hawkins' apparent opinion that juries deliberating in unity are likely to produce "better" results than juries deliberating in factions. At one point he states: "A group which tries to reach a decision without dividing into factions does not pay any attention to how the people are lined up but only to how the weight of rational argument is lined up . . . ."[169] At another point he concludes that when deliberations are in unity, "we would expect that the content and logic of the individual arguments will have primary importance."[170]

If Hawkins is correct, smaller juries should have substantial qualitative advantages over larger juries, because considerable evidence suggests that larger groups are more likely than smaller groups to become factious.[171] But there is little evidence to support Hawkins' interesting conjectures. Hawkins himself consciously ignores the characteristics of deliberation in unity in the most detailed portion of his analysis, and he acknowledges that the formal characteristics of group decision-making that he does examine would probably yield little understanding of groups that hew close to the ideal of deliberation in unity.[172]

The major evidence supporting Hawkins' conclusion that deliberation in unity is the more rational process is his finding that the length of discussion when groups are unaligned tends to be unrelated to the number of individuals in the minority,[173] but that once

168. *Id.* at 108.

169. *Id.* at 115.

170. *Id.* at 155. Presumably this statement does not hold for deliberation in factions, where such formal characteristics as the relative size of the majority and minority are seen to be of primary importance.

171. *See, e.g.*, Hare, *supra* note 118; Holloman & Hendrick, *supra* note 118; Thomas & Fink, *supra* note 118.

172. C. Hawkins, *supra* note 32, at 154-55.

173. *Id.* at 113-15.

jurors have voted and revealed the existence of coalitions, a relationship emerges between the length of subsequent arguments and the number in the minority.[174] Hawkins apparently interprets the fact that this relationship exists only when coalitions are acknowledged as evidence that the jurors are attending to alignments and irrelevant attempts at persuasion rather than to the rational analysis of fact.[175] Implicit in this interpretation is the notion that there is only a constant number of rational arguments to be made and facts to be analyzed; hence one would expect discussion confined to the rational and factual to take the same amount of time regardless of the way in which opinion is divided.[176] Stating the position in this way reveals its weaknesses: Even if there are only so many rational arguments to be made or facts to be analyzed, it doesn't follow that all arguments will always be made or that some may not be made more than once.

Furthermore, Hawkins' findings are just as consistent with the hypothesis that deliberation in unity inhibits the expression of minority opinions. It has already been suggested that the closeness of small groups, a closeness that may lead to more unified deliberations (or vice versa), might tend to inhibit dissent.[177] Indeed, the results of one study appear contrary to Hawkins' conjectures. In an examination of the contents of interaction in various groups, Hamblin and Miller found that evaluative statements were more common in smaller groups. Their conclusion is that the presence of factions, more likely in larger groups, may cause members to communicate more factual material and less opinion.[178] Perhaps Hawkins' results may also be explained by the fact that the periods of deliberation in unity that he examined tended to come disproportionately at the start of discussions, where the minority's role might differ from what it is when a verdict is close at hand.

The only other evidence in Hawkins' study bearing on the possible superiority of deliberation in unity is anecdotal observations that jurors aligned in factions may direct harassing tactics or unreasonably extreme arguments to the opposite faction.[179] The presence of irrational arguments, however, does not mean that

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174. *Id.*

175. *Id.* at 115.

176. Hawkins is not very clear on his analysis here. This is my interpretation of his chain of reasoning and may be unfair.

177. *See* text at note 142 *supra*. *But see* Hoffman, *supra* note 120, at 107.

178. Hamblin & Miller, *Variations in Interaction Profiles and Group Size*, 2 Soc. Q. 105 (1961).

179. *E.g.*, C. Hawkins, *supra* note 32, at 131-32.

rational arguments have been suppressed, and may indicate that factional deliberation tends to ensure that all available arguments, of whatever type, are put before the group.

In short, while Hawkins' thesis is intriguing, there is virtually no hard evidence that suggests that deliberation in unity or the deliberations of smaller juries should yield more rational results than deliberation in factions or the deliberations of larger juries.[180]

H. *On Balance*

The arguments in this section, both those that are statistically derived and those that are based more broadly on the social-psychological literature, are crude. The statistical analysis requires too many assumptions that are obviously false in at least some instances, and the social-psychological analysis is both based on imperfect research and, for the most part, too far removed from the jury situation to allow confident generalization. Nevertheless, the evidence is generally consistent and overwhelming. *Current knowledge justifies the general conclusion that where the verdicts of six- and twelve-member juries diverge, the verdicts of twelve are likely to be of somewhat higher quality than the verdicts of six, and are likely to be superior with respect to other important values.*

Had the proponents of the six-member jury in *Williams* and *Colgrove* been assigned the burden of showing that the change in size was unlikely to decrease the average quality of jury justice, they would not have prevailed given our present state of knowledge. Indeed, a fair evaluation of the relevant evidence suggests the opposite conclusion. Available evidence, however, is insufficient to permit much more than a general statement about the likely *direction* of size effects. In particular, the evidence is insufficient to assess the magnitude of size effects. Yet this may be the crux of the problem. The increased cost of larger juries means that the magnitude of size

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180. *But see* Rosenblatt & Rosenblatt, *supra* note 138. The Rosenblatts are apparently persuaded by Hawkins and their reading of the small-group literature, for they conclude, largely on the basis of Hawkins' hypothesis, that "the six member jury affords a superior and more permanent consensus of opinion." Rosenblatt & Rosenblatt, *supra*, at 633. If they mean that the members of smaller juries will be more satisfied with their decisions after reaching them and less likely to change them in some post-deliberation setting, I agree with them. If they mean that two six-member juries hearing the same case are more likely to agree than two twelve-member juries hearing that case, or that the verdict of the six-member jury has resulted from a more rational consideration of the evidence—or is better by some other standard—then I must disagree. It may be easy to maintain an appearance of complete rationality where minority opinions are suppressed or not present. But so long as the minority position is not itself irrational, a good decision should give a minority the weight its arguments deserve.

effects is likely to be crucial in determining the desirability of smaller juries.

I have suggested that in only a fraction of all jury trials would the verdicts of twelve differ from those of six.[181] Review of the literature indicates that Zeisel and Diamond's ideal experiment probably would reveal that where verdicts do differ, those of twelve would, on the average, be superior. But in many cases it would be impossible to say that the verdict of one jury is better, and in some cases the verdict of the smaller jury would appear preferable. It is impossible to weigh dollar and time savings of the smaller jury against these speculative outcomes. The costs of six-member verdicts might be so low as to be clearly outweighed by the savings they engender, or they may be so substantial as to warrant immediate reversal of the decisions in *Williams* and *Colgrove*. If, however, the sixth and seventh amendments do not allow one to weigh dollars against any benefits—however small—of larger juries, then it appears that *Williams* and *Colgrove* should be reversed irrespective of the magnitude of the size effect. My best guess is that these decisions should be reversed on either test: The savings of the smaller jury are quite likely outweighed by the costs, some of which we may never measure.

Still, based on current knowledge it is impossible to be scientifically certain that future research will not disclose substantial advantages to juries of six. For reasons such as those suggested by Hawkins and others, one may find that juries of six do better with respect to certain values than juries of twelve. In addition, research capable of revealing discernible differences may show none. My impression is that the final judgment on six versus twelve will turn on the values that individuals subjectively place on the presence of minority views in the jury room. This judgment may and perhaps should depend on the roles that minorities play in jury deliberations and the ways in which they play them, something we currently know little about.

III. Research Design and Other Matters

A. *Measuring Verdict Differences*

Thus, I join Zeisel and Diamond in their call for further research, but I favor different strategies than the carefully controlled "real world" experimental approach they emphasize. If I am correct in my argument in Part I, most cases will so clearly favor one party

181. *See* section IB *supra*.

that studies of actual trials are unlikely to reveal substantial differences in the percentage of plaintiff or prosecution verdicts rendered by different-sized juries. One statistic, however, can be expected to respond sufficiently to jury-size differences to provide evidence as to whether important size effects do or do not exist: the percentage of hung juries in jurisdictions that mandate different-sized juries.

The preceding section indicates why one would expect twelve-member juries to hang more frequently than six-member juries. The validity of this expectation could be tested by comparing hung-jury rates in states that try crimes to twelve with those in states that try similar crimes to panels of six. The experimental approach advocated by Zeisel and Diamond would not be desirable because the low incidence of hung juries would require an exceedingly large number of experimental trials before one could expect differences in the hung-jury rate to achieve statistical significance. Moreover, experimental controls are unnecessary because the array of criminal cases tried in a state that mandates six-member juries is likely to be so large and varied that these trials as a group are unlikely to differ greatly from the array of criminal cases tried to twelve-member juries in a neighboring state; hence the expected rate of hung juries in the two states, absent size effects, would be the same. This conclusion entails an assumption that all other things are equal that could be checked both by examining the kinds of cases tried to juries in the two states and by comparing hung-jury rates in the six-member jury state with these rates in a number of neighboring states trying criminal cases to twelve. If additional states reduce jury size in all cases, the design may be further improved by comparing hung-jury rates in these states with the rates in twelve-member states and with their own rates before the switch to six.[182] If six-member jury states have lower hung-jury rates than twelve-member neighbors and lower rates than they themselves had before the change in size, one could reasonably conclude that the difference was due to size effects and not to some confounding factor.[183]

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182. On the design of such an experiment generally, see Lempert, *supra* note 12, at 130-32. One could also use other means to increase the certainty that any variation in hung-jury rates was due to jury size and not to some other factor. For example, if one worried that attorneys make different decisions on whether to demand jury trial when juries are composed of six rather than twelve, one might interview attorneys in different jurisdictions to learn what factors they weigh when considering the possibility of a jury trial. In addition, one could check the rate at which attorneys demand jury trials before both sizes of juries to evaluate the extent of any differences.

183. I have already cited data collected by Zeisel that indicates that the hung-jury rate in a nationwide sample is more than twice as great as the hung-jury rate in one

In theory, a second statistic calculable on the basis of trial results that would reflect differences attributable to jury size is the variance of the amounts awarded in damage actions.[184] One would expect the variance to be larger in jurisdictions where damage actions are tried to six than in jurisdictions where they are tried to twelve. Again, experimental controls might not be essential. Those damage actions brought to trial in a six-member jury state could be expected as a group to be generally similar to damage actions tried to juries in neighboring twelve-member states. Here, however, more caution would have to be exercised in making comparisons because there are a larger number of plausible explanations for any differences that might be discovered. Data from states that allow attorneys to elect among different-sized juries would be unacceptable, and data from states that provide different-sized juries for different kinds of cases would present peculiar problems.[185] Other confounding factors include potential differences in the settlement policies of insurance companies, differences in the quality of the bar of each state, and specific state laws or other conditions (*e.g.*, allowance of punitive damages) that might affect the size of awards.

These potentially confounding factors should not imply that study of the association between jury size and damages awards might not be useful. One fortunate feature of the expected association between jury size and awards that provides an important check on many of the factors that could confound a comparison of variance statistics is the statistical expectation that the average of awards rendered by different-sized juries in similar types of cases would be the same even if the variance in awards is greater for the smaller jury. A finding that the average amounts awarded in two states were not greatly different would suggest that a comparison of the variance in awards is an appropriate indicator of size effects. Visual comparison of the range of cases that make up the averages would be a further check.

Florida county, *see* note 99 *supra* and accompanying text, but clearly more controlled comparisons of a similar nature are needed before one can be certain that these results are attributable to jury-size differences.

184. This statistic may be based on all damage awards or on a subset of damage awards, such as automobile personal injury cases.

185. Such states, however, would be particularly suitable for bi-state comparisons if cases in the comparison state could be sufficiently broken down by type. In comparing a state in which civil juries were always composed of six with another state in which juries of six were used only in automobile negligence cases one would expect no difference in the variance of awards rendered in automobile negligence cases, but a greater variance in the awards rendered in actions that were tried to twelve in the second state.

An alternative, and perhaps superior, strategy for exploring the association between jury size and variance in damage awards is experimentation with mock trials. Experimentation allows complete control over the facts and rules of law involved. Because all juries, except those that hang, will reach a decision on damages, a moderate number of experimental trials could produce either statistically significant differences in the variance of awards[186] or reasonable certainty that such differences in variance do not exist to any important extent. In addition, working with mock juries allows the experimenter, by monitoring deliberations, to test the validity of the theory that it is averaging processes that cause juries of twelve to show less variation than juries of six.[187]

Mock juries also provide the preferred strategy for examining other probable differences between juries of twelve and six. This "laboratory strategy" allows selection of cases that are sufficiently similar to reveal systematic but unanticipated size effects. In addition, members of visible minorities, such as blacks, could be placed on juries to determine the effects of their presence. Even if the presence of visible minorities had the same influence on juries of twelve as on those of six, the bare finding of influence would indicate likely size effects because the presence of one or more minority group members is more likely on larger juries.[188]

The most important advantage of mock-jury experimentation is that it allows the researcher to monitor the deliberation process. In a close case it may be impossible to know or to prove that one outcome is better than another, yet it may be possible to conclude that a particular decision-making process is preferable. Thus, if research reveals that six-member juries tend to reach their verdicts by deliberations in which all jurors make rational contributions while twelve-member juries are dominated by one or two members or draw lots in frustration, one might well conclude that the quality of justice rendered by six is likely to be superior to that rendered by twelve, even though nothing in observed verdict differences makes this conclusion obvious.

If mock juries are used, the researcher must be careful to avoid certain problems. The most obvious pitfall inheres in the choice of jurors. While college sophomores may be good subjects in experiments designed to explore basic social-psychological processes, a

186. This would depend, of course, on the extent to which individual awards varied both within and between groups.

187. *See* text at notes 121-24 *supra*.

188. *See* Table One *supra*.

group composed of college students generally will be unsuited for jury-size research. There is simply too much evidence that juror interaction is strongly influenced by factors such as age and occupational status.[189] The homogeneity of college students on these and other dimensions not only indicates that their deliberations are unlikely to represent actual jury deliberations, but also diminishes any advantage that juries of twelve enjoy over juries of six. The model for the selection of mock jurors should be the "laboratory" studies generated by the Chicago Jury Project.[190] Project researchers received permission from federal district courts in three cities to use as mock jurors individuals who were part of the court's venire but who were not otherwise empaneled on the day of the experiment. Absent such judicial cooperation, experimenters should try to get jurors from the larger, nonstudent community.[191]

Although access to real jurors is ideal, jury-size research probably should vary from the Chicago model in certain respects. Jurors in the Chicago project were neither examined on voir dire nor subjected to challenge. Yet voir dire questioning with a right to challenge adds an important element of realism to jury-size experimentation. Effective use of voir dire might minimize some of the differences between juries of six and twelve.[192] The Chicago researchers' use of pre-deliberation votes also should be avoided. While such information is important to measure the effects of the deliberation process on individuals' attitudes, the work of Gerard and his associates indicates that prior written commitment will affect the extent to which individuals are influenced by groups.[193] Since the goal of the proposed research is investigation of influence processes within the jury as a whole, researchers should not risk the potential interference with the processes of attitude change that prior commitment might engender.[194]

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189. *See* R. SIMON, *supra* note 32, at 98-119; C. Hawkins, *supra* note 32, at 22-25, 30-41; Strodtbeck, James & Hawkins, *supra* note 70.

190. *See, e.g.*, R. SIMON, *supra* note 32, at 98-119; C. Hawkins, *supra* note 32, at 22-25, 30-41; Strodtbeck, James & Hawkins, *supra* note 70.

191. *Cf.* Bevan, Albert, Loiseaux, Mayfield & Wright, *supra* note 154.

192. Indeed, it would be very interesting to work with juries that have been subject to voir dire challenges and those that have not. Comparisons could give some indication of the extent to which elimination of certain jurors and the indoctrination that is often possible on voir dire affect potential jury-size differences. One danger to be avoided or experimentally tested is that voir dire will be taken more seriously or be more thoughtfully conducted in the experimental setting than it would be by the typical practicing attorney in an ordinary jury trial.

193. Gerard, *Deviation, Conformity, and Commitment*, in CURRENT STUDIES, *supra* note 118, at 263; Gerard, Wilhelmy & Conolley, *supra* note 93.

194. Refraining from obtaining pre-deliberation votes would prevent researchers

The selection and presentation of experimental cases also poses important problems. The facts of the cases used for a study of size effects must support at least two possible verdicts; otherwise there is little reason to expect that different-sized juries will decide differently. Civil cases have a particular advantage in that they generate information on two very different decision-making processes: the decision on liability and the decision as to damages.[195]

When cases are close, differences in jury verdicts may stem from random rather than systematic factors. One would then expect verdicts of juries of the same size to differ from each other as often as they differ from those of juries of a larger or smaller size. If, however, verdict differences are systematically associated with jury size, it will be necessary to explain why these differences exist. Here monitoring and analysis of jury deliberations is essential. One might note the potential problem that the monitoring process could make the jury self-conscious and affect its deliberations, but the available evidence suggests that the problem exists more in theory than in practice.[196] Jury monitoring also allows one to investigate the influence of specific factors, such as the race of criminal defendants, on the deliberations of different-sized and differently composed juries. Cases constructed to include such factors will probably show higher rates of verdict disagreement than other close cases. This finding would be important, because size differences in such cases may have particular relevance to the realization of other values of the legal system.

An additional advantage of using mock rather than real juries is that presentation of cases on audio or videotape ensures that the members of each experimental jury see essentially the same case. However, the use of such devices decreases the realism of the mock trial. This, plus the fact that mock jurors know that they are not actually determining an individual's fate, are probably the two most important weaknesses of this experimental approach. Both suggest that experimental juries will be less motivated to reach subjectively correct decisions and less willing to extend their deliberations than they would be if the cases were real. Nevertheless, the experience of the Chicago researchers working with recorded trials is heartening

from following the suggestion of Zeisel & Diamond, *supra* note 10, at 292, that initial vote distributions be equalized by assigning members to juries based on initial ballots. As Zeisel and Diamond recognize, the problem they are concerned with diminishes as sample size grows. The problem also will be less when close cases are used, since almost all juries can be expected to have some dissenters.

195. *See generally* C. Hawkins, *supra* note 32.

196. *See, e.g.*, R. Simon, *supra* note 32, at 38.

in this regard. Simon reports that most of her jurors took their roles quite seriously, and that the average experimental jury's deliberations lasted as long as the average deliberation for a trial that takes two or three days.[197] Observation of the length and tone of the jury deliberations, and post-verdict interviews, can provide good checks on the extent to which the necessary realism has been achieved.

The mock juries in the Chicago project also hung more frequently than do trial juries generally.[198] This may be entirely due to the difficulty of the Chicago project cases,[199] but it may also be due to the fact that experimental juries do not feel as much compulsion as real juries to reach a conclusion. Perhaps a social-scientific version of the "Allen Charge" is called for.[200]

B. *So What?*

Suppose experiments such as those suggested above are conducted, and the results indicate that verdicts of twelve are superior to those of six. One might still ask, "So what—haven't *Williams* and *Colgrove* decided the matter?" While there is no reason to be confident that the Supreme Court would do an about-face on the jury-size question if presented with these hypothesized results, the question of how the Court should react to such research is an interesting one.

In his classic commentary on the empirical evidence presented to the Supreme Court by the plaintiff in *Brown v. Board of Education*,[201] Professor Cahn concluded that the Court was misguided even in acknowledging the material with so much as a footnote.[202] In justifying this position, he commented: "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records."[203] Cahn was, of course, correct. Not only was the Court's scientific foundation flimsy, as Cahn proceeded to demon-

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197. *Id.*

198. *See* C. Hawkins, *supra* note 32, at 43-44.

199. *Id.* at 44.

200. *See* Allen v. United States, 164 U.S. 492 (1896). *Cf.* Note, *supra* note 90, at 100-06. My purpose here is not to design a jury-size experiment, but to sketch some of the factors that should be considered before such experiments proceed. Hopefully the discussion also suggests more generally the potential power of laboratory experiments to elucidate questions of practical interest to lawyers.

201. 347 U.S. 483 (1954).

202. Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150 (1955).

203. *Id.* at 157-58.

strate,[204] but the values involved made even convincing proof of the evils of segregation irrelevant. Blacks are degraded by segregation regardless of the extent to which they are hurt or, indeed, helped by such a system, and the Constitution in 1954 could have been, should have been, and was interpreted to prohibit states from legally separating the races.[205]

But the jury-size cases are very different from the segregation cases, and the influence of the results of empirical research should be quite different. The Court was not deciding any great value question when it decided in *Williams* and *Colgrove* that neither the sixth nor the seventh amendment required juries of twelve. Rather, relying on its premise that a reduction in jury size would have little effect on jury verdicts, the Court concluded that a reduction in jury size was not constitutionally prohibited because *no* value *was* substantially affected. If changes in jury size do not affect the values that inspired the jury trial guarantees,[206] it becomes almost irrelevant that the framers equated the concept of a "jury" with a body of twelve.[207]

Given the Court's functional response to the apparent intent of the framers, if a substantial body of well-conducted research should demonstrate that jury size does affect verdicts in ways that are detrimental to important values, the Court should reconsider its conclusions in *Williams* and *Colgrove*. There is little left of these opinions once the premises on which they rest are proved false.[208]

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204. *Id.* at 159-65.

205. This is not to say that the state of the scientific study of race relations should have had no effect on the *Brown* decision. Had there been a body of reputable scientific literature that demonstrated that all races benefited substantially from segregation it is quite possible that segregation would not have been seen as inherently degrading for one race; had science "demonstrated" that black people were necessarily inferior to white people, the degradation entailed by segregation might not have been perceived as unfair. A somewhat different view of what was "known" about black people may have led to the decision supporting segregation in Plessy v. Ferguson, 163 U.S. 537 (1896). The implication of Kalven's question, "[F]or social science learning to have an impact on the living law, will it first have to become *popular* learning and enter law via the normal political process?" is an important insight into the relationship between empirical science and fundamental values, at least if the judicial system is considered to be part of the normal political process. Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN A CHANGING AMERICA 56 (G. Hazard ed. 1968).

206. The majority in *Williams* professed an inability to discern precisely what the framers meant when they used the word "jury," but they acknowledged that the "usual expectation" in 1789 was that juries were to be made up of twelve. 399 U.S. 78, 98 (1970). Justice Harlan, concurring, emphasized the majority's disingenuousness in expressing even this degree of uncertainty. 399 U.S. at 122-29.

207. *See* note 55 *supra*.

208. Justice Harlan's concurring opinion, based on his rejection of the "incorporation theory," would not necessarily be undercut by empirical findings. However, re-

At the very least, the results of such research should force the Court to face the difficult question whether adverse results associated with juries of six are justified by the savings that smaller juries engender.[209]

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search might show such an extreme increase in irrationality or prejudice when jury size is reduced that one taking Harlan's perspective would conclude that a jury of twelve is essential to due process in any case tried by a jury. My hunch is that the differences between six and twelve will not be extreme enough to sway one who accepts Harlan's position.

209. Good research on the exact magnitude of these savings would be particularly helpful. Lacking such research, the Court, if proved wrong on its initial premise, might rest an affirmance of *Williams* or *Colgrove* on the premise that the savings from a reduction in jury size are substantially greater than they actually are.

Three points relating to questions of empirical research and jury size have not been discussed in this paper, but are worth brief mention before concluding. First is the fact that a reduction in jury size implicates values unrelated to differences in verdicts. These values include such factors as the involvement of ordinary citizens in the ongoing processes of democratic government and the appearance of fairness to individuals on trial. Cutting jury size in half will substantially decrease the number of citizens who serve on juries or who have close acquaintances with such experience. A decrease in jury size also will decrease the percentage of minority group representatives who sit on juries. *See* sections IIB, C *supra*. In a society as pluralistic as America is today, there may be a positive value in minimizing the number of situations in which minority group members are judged by groups lacking minority representation, whether or not jury judgments would be affected by the presence of minority group members. These values have been largely ignored in this article, in part because the Court has largely ignored them in the jury-size cases and in part because I have attempted to focus this disscussion of empirical evidence on a single legal issue.

The second point worth mentioning before concluding is that, while the question of the unanimous verdict has not been discussed in this paper, the general approach of the analysis would apply to this problem as well. Statistical analysis and the social-psychological literature suggest that the effects of allowing nonunanimous verdicts are likely to be much more drastic than the effect of reducing jury size. Zeisel has called the nonunanimous verdict "reduction [in size] with a vengeance" and has demonstrated the statistical sense in which this is true. Zeisel, *supra* note 8, at 722. The deliberation process particularly may suffer from a situation in which a majority does not have to contend rationally with the arguments of a minority sufficiently small to be outvoted. One can only speculate on what the effects of such a situation are likely to be on jurors in the overridden minority or on individuals who learn that they have been convicted over dissent. The Supreme Court has approved the use of nonunanimous verdicts in state courts, at least so long as nine votes out of twelve are required to convict. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). It has not yet, however, faced a case in which only a majority of six was required to convict. Research on six-member juries with four, five, or six votes required to convict could be of great importance should such a case ever reach the Court.

A final point implicit in this article and applying generally to empirical research on legal issues is that the common strategy of gathering data on interesting law-related problems "to see what is out there" is at best likely to be inefficient and at worst likely to produce misleading results. A researcher should have as good an idea as is possible of what he is likely to discover before he begins to collect data. At a minimum, existing bodies of relevant theory and data should be examined. With this as background, and with information gained from pre-tests, exploratory investigations, or general knowledge, the researcher can check his experimental design against the information he is likely to discover. Such a review can provide a forewarning of likely analytical problems, suggest interesting questions that can be asked of the data, and

indicate a need for collecting information on matters that would otherwise appear only tangentially relevant to matters being investigated. Where such a review allows the generation of reasonable hypotheses, the efficiency of the entire investigation is enhanced because one-tailed significance tests become appropriate, thus increasing the power of the tests. *See* H. BLALOCK, *supra* note 47, at 127-28, 188-93. Such a review may also suggest that, given the available data, the research is not worth doing because the likely results will have only the most equivocal relationship to the questions of legal interest.

I should also note that, as this article goes to press, the results of a number of recent studies on the jury-size question are beginning to be reported. Volume 2 of the Social Action & the Law Newsletter (Center for Responsive Psychology, Brooklyn College March, 1975) reports three studies: one by Valenti and Downing that found that when a case was prosecution-oriented six-member juries were more likely to convict and less likely to hang than twelve member juries, one by Snortum, Klein and Sherman that found that one assertive confederate arguing for conviction had more influence on juries of six than on juries of twelve, and one by Buckhout and Weg that found support for "the belief that 6-person juries tend to convict at a higher level of guilt (in a homicide) . . . ." *Id.*, at at 9. None of these studies is currently available in print, so I am unable to evaluate their methodological adequacy.

In another study, Beiser and Varrin, looking at civil cases in four New England federal district courts before and after the adoption of six-member juries, report that six-member jury trials took an average of 13.2 hours as compared to an average of 16.4 hours for twelve-member jury trials, Beiser & Varrin, *Six-member Juries in the Federal Courts*, 58 JUDICATURE 425, 430 (1975); the median trial-length, however, was 12.1 hours for both. *Id.* The probability of settlement, number of witnesses, time per witness and length of voir dire showed little or no relationship to jury size. *Id.*, at 428-30. Deliberations lasted somewhat longer in the twelve-member jury trials. *Id.*, at 430. The study also found that twelve-member juries more often found for plaintiffs and granted larger damage awards than did six-member juries, even after controlling for cause of action. *Id.*, at 431. However, the number of trials on which the analysis of verdicts is based is so small that little confidence should be placed in the verdict-related findings.

Finally, I understand that Drs. Barton and Padawer-Singer of the Bureau of Applied Social Research of Columbia University are engaged in a well-financed large-scale research project, investigating the differences between six- and twelve-member juries. Hopefully, this ongoing research will be able to discern whatever differences exist between juries of twelve and those of six, thus resolving some of the questions this article had to leave open.

Mr. SCHULMAN. The National Jury Project is a nonprofit organization which is concerned with research and consultation around all aspects of the jury system.

In the last 4 years of existence of the National Jury Project, some 75 cases, criminal and civil, have been worked on by its various members in many Federal districts across the country. We have done thousands of interviews with prospective jurors, and hundreds of interviews with jurors who have served on Federal cases—civil and criminal. We have probably done more research of this sort than any other group in the country.

Associated with us are some 35 people, such as social scientists, lawyers, and paralegals.

I will address the issues in title I of S. 2074.

I am a sociologist by training, and a lecturer in psychiatry in Columbia Medical School. I have taught at many universities around the country before beginning this work, and have now spent a good many years at it.

We should say that the jury project is generally devoted to the strengthening of the jury system and the creation of an effective cross-section of people serving within the jury system. That is our rationale for existence, and that is the goal we have been struggling for.

Let me just comment, very briefly, on S. 2075, although that is not our main purpose in being here. We are in total support of S. 2075, with all of its components.

Now, as to S. 2074 and title I, let me first note in contradistinction to one of the previous witnesses——

Senator DECONCINI. Dr. Schulman, before you get into that, let me ask you a question about S. 2075. It is not a part of that bill that concerns the increases of filing fees. I wonder if you have any opinion as to the necessity to address that?

Mr. SCHULMAN. That is one of the items we have no opinion on.

Senator DECONCINI. Thank you.

Mr. SCHULMAN. I believe the previous witness took the position that civil disputes are relatively minor in a society such as ours. Our position is quite different.

Civil disputes, in our mind, go to the warp and the woof of a democratic society, and the machinery that is designed to adjudicate those disputes is at the center of a meaningful social order.

Therefore, we reject such language as: "In civil cases, the sensitive considerations which pertain to criminal jury trials under the sixth amendment and the due process clauses of the Constitution do not apply." We believe they apply with a vengeance.

Let me cite some of the cases we have been working on, or have worked on in the past, to support that assertion.

The National Jury Project was associated with a broad spectrum antibiotic case which is still before Judge Lord in the Federal court—the most complex litigation ever to come before the civil courts of the United States.

In a survey that was done in the Minnesota Judicial District, St. Paul and Minneapolis, we discovered that 60 percent of the prospective jurors believe that large corporations fix prices. One of the major issues in that litigation was whether the major pharmaceutical com-

panies of the United States fixed prices around tetracycline, a terribly important drug.

The community has an interest, and more than that, in the availability of tetracycline, a very major drug, at prices that people can afford.

The adjudication of that dispute, and its implications have a great deal of meaning for the society.

In criminal cases now, as well, as you undoubtedly know, Federal judges in almost all districts will conduct the voir dire. The average time for civil case and criminal case jury selection in a Federal court is less than 1 hour, which means it is very difficult to evoke any of the prejudices which may operate in a jury venire.

Let us take another example. In West Virginia, several years ago, there was something called the Buffalo Creek disaster—a case that the National Jury Project had some involvement with. You will remember that was a terrible black flood that came down the creek and wiped out 16 villages—most of the victims were miners and their families. Those people, 600 of them, undertook a civil litigation against Pittston, the largest independent coal company in West Virginia.

The issues there went beyond physical property damage and wrongful death. They went to the heart of a new tort—whether these people were entitled to recover damages for damage to their psyches and their loss of community.

There was ultimately a settlement of that case. The miners and their families did receive some damage, and the tort was established.

In that area of West Virginia—the Charleston district—there is an enormous amount of prejudice toward large coal companies and toward black lung miners. It is a prevailing attitude that many miners who are black lungers are really undeserving and should not receive damages because they would simply use the money poorly.

Those are attitudes which then operate upon jurors who are called to serve in cases of that sort.

Moreover, it seems to us, the society has a meaningful role in the adjudication of the consequences of such a disaster.

A previous witness also testified that uniformity would be desirable. He is not quite correct to say that 6-person juries are the local option in the 84 Federal districts. The more clear-cut reality is that the local rules in these districts permit discretion in different classes of civil cases, so that in antitrust cases there may well be a possibility of a 12-person jury under the local plan, as in some other type of cases. It is not the fact that in all of those 84 districts, in all civil litigations, a 6-person rule has been adopted.

If I understand the testimony of Mr. Imlay properly, his only justification for the reduction of 12 to 6 is streamlining. So you move from six to five to four to three to one, and then to zero. The logic of that position is to do away with juries in civil matters.

There is a reason to believe that the U.S. Judicial Conference is on record over many years as having a healthy scepticism about the jury system. They have a healthy scepticism about peremptory challenges, and their value. They have a healthy scepticism about the value of juries in civil cases. I do believe this is the case in criminal cases, as well.

I suspect that it is important that this committee consider whether or not the jury system is something that is worthwhile. If you want to confront the sixth amendment, then confront it on its merits. Do not whittle away at it.

Senator DeConcini. Where do you come to this conclusion of healthy scepticism? Is it reported in their reports?

Mr. Schulman. Yes. My reading of their reports suggests that they really have that.

Senator DeConcini. You are telling us that a total reading of those reports leads you to that conclusion, but it is not a specific statement?

Mr. Schulman. That is correct.

Senator DeConcini. Thank you.

Mr. Schulman. Let me now move to some of the evidence which is available to this committee. We will put this in the record.

Since *Colgrove* v. *Battin*—the Supreme Court's decision concerning 6 versus 12—there has been a good deal of empirical research done by scholars under grants of the National Science Foundation and other agencies of the U.S. Government because the issue of 6 versus 12 is a genuine important policy issue.

Almost all of the research that has been done talks to the reality that 12 is better than 6. In important substantive ways, that is the case. For example, 12-person juries are much more likely to consider the evidence than 6-person juries. Twelve-person juries are much more likely to provide access to everyone in a jury, so that his or her view may be expressed. Twelve-person juries are much less likely to be led by one or two individuals than six-person juries which are much more amenable to the influence of a strong person or a person of influential background.

Twelve-person juries are less likely to achieve one thoroughgoing clique. They may achieve cliques, but there may well be two cliques.

Twelve-person juries are more representative of the judicial district than six. Twelve-person juries are much more likely to contain some individuals who are generally bias-free, and when they are biased, the biases are more likely to offset each other.

That is the conclusion of the work done by Prof. Richard Lempert at the University of Michigan Law School who associates himself in this testimony and who will be joint author of the submission that we will give to the committee.

Senator DeConcini. When will we have it?

Mr. Schulman. By October 7.

Senator DeConcini. Thank you.

Mr. Schulman. It is the conclusion of Dr. Alice Podowa-Singer's work, under grant from the National Science Foundation which has not yet been published, but this is what she has reported in the talks she has given around the country, and in her preliminary statement.

Let me also call to the attention of the committee that Dr. Zeisel and his colleague, Dr. Diamond, took a very hard look at the empirical research underlying the Supreme Court decision in *Colgrove* v. *Battin*. They have published a scathing, critical, devastating denunciation and expose of that research. They regard it as incompetent, as methodologically unsound, and not worthy of the decision which the Supreme Court provided.

In the light of all of this, you may well ask why have these 84 Federal districts, to the extent that they have, adopted the 6-person plan? I think the reasons are quite obvious.

First of all, there is always a tail to the Supreme Court kite. The Supreme Court kite has a great deal of authority.

Second, there is a saving, however minute, in resources. I was glad to see that Mr. Imlay noted it was not money that he was talking to.

Most importantly, jury clerks in the Federal system want to save time. The jury clerks, as gatekeepers of the system, have been the major impetus for the adoption of that 6-person plan. I do not believe, by and large, that the impetus has come from the Chief Justices of the districts, themselves. This has not been by observation.

On the other hand, the judges are interested in one other thing. They are interested in management of their courts. They prefer a 6-person jury, or a 7-person jury, or an 8-person jury because smaller juries are simply easier to manage, from the point of view of court or trial management. There are fewer people who might put up their hand and ask a question. There are fewer people who will come in late. There are fewer people who will be unruly in some fashion. I think those are the major reasons.

Beyond that, there is, I think, the philosophy I alluded to before that most judges we have come across in this country—Federal judges—really have that healthy scepticism which I referred to before about the jury system. They think they are better judges of the facts. They really do have some tension between themselves and the Sixth Amendment.

I think that what their consciousness leads to is a system of justices which would replace the jury system with a judicial bureaucracy. I think it is that particular point of view, although it never gets expressed explicitly, which underlies some of the reasons why they have been open to the pressures which have come from the clerks.

With that, let me conclude my remarks. If there are questions, I would be glad to answer them, or Mr. Kairys could proceed.

Senator DeConcini. Regarding your argument, I think it is well taken. I appreciate the idea, although it could be said that if you increased the jury from 12 to 14, or 16 or 20, or more, then it would be that much better. Would you conclude that? Or is there a number where the benefits diminish?

Mr. Schulman. Dr. Zeisel has a wonderful footnote to one of his articles in which he points out that the Greeks also had 12 people on their juries, and that they had some interesting discussions about why 12. The empirical research that has been done on group size suggests that when you go much beyond 12 to 14 or 15, you begin to create various forces that make it more difficult for a group to work together to accomplish a task.

There is rather voluminous literature on small group research. The number 12 is not a sacred number, but it appears to be a number which provides a perfectly good context for a group that is reasonably varied and heterogeneous to be able to work on a task in an effective fashion.

Senator DeConcini. Regarding the question of controls—that 12 people are less biased—that is more a matter of opinion than anything else, is it not?

Mr. SCHULMAN. I do not believe so. I believe it is a matter of logic to begin with.

Prejudice is an ingrained American value. Most of us are prejudiced in one way or another.

In civil matters, as well as criminal matters, those prejudices are likely to be activated. If you have 12 people, you are simply more likely to have 1 or 2 who might be without some of those more explicit prejudices, or who are better able to cope with their own prejudices, than if you have 6. That is a matter of arithmetic.

If you assume, as I do—and I think all the social and psychological research demonstrates—that prejudice is, positively and negatively, a reality in American life, then 12 people are more likely to have offsetting biases than 6.

Senator DECONCINI. Just out of the numbers?

Mr. SCHULMAN. Yes.

Senator DECONCINI. What is your reaction to a consideration where the law might state that the juries will be 6 or 8, but any person can file to petition a request to make it 12? That puts the burden on the individual, and thereby those who do not want to meet their burden, the benefits of what they may be, if any, of a smaller amount?

Mr. SCHULMAN. I would oppose that on the very simple grounds that when you have the burden on the individual and you have the inertia operating there, then what happens is that the judge requires a showing of a sort which, oftentimes, goes beyond the capacity of the plaintiff.

In all of this, when the institution makes the presumption that something is so, and then asks the individual—the plaintiff—to make the showing, the chances are that the individual is under too much of a burden. That has been our experience.

Senator DECONCINI. Senator Wallop?

Senator WALLOP. I have several questions.

I think the first is this. Has the National Jury Project made any effort to have the local rules providing for 6-person juries changed to require 12-person panels anywhere in the districts?

Mr. SCHULMAN. We have talked to several judges about that. The problem of trying to initiate in the Federal judicial system is a very mysterious one. The only people who could initiate are, indeed, the judges themselves, and that committee which is responsible for the rulemaking within a given judicial district. There is no basis for citizens to initiate any kind of process that would lead to that modification.

Senator WALLOP. So the answer is no, they have not? You have not, is that right?

Mr. SCHULMAN. Yes; that is correct.

Senator WALLOP. I find it difficult to believe that there is no way in which any useful approach could be made to any specific district to try to get them to change the rule, or go back to 12. I guess I do find it difficult to believe that it is not at least worth trying.

Mr. SCHULMAN. I think that is true. We have been trying to do some education amongst judges by attending, when invited, seminars. We would hope that the U.S. Judicial Conference would make its committee memberships much more an open process than they do now.

It seems to us that this is an inbred group. You have judges and a few celebrated lawyers. Very few people, other than that, have access.

Senator WALLOP. There are similar things on the Judiciary Committee.

Mr. SCHULMAN. A little sunshine might be warranted.

Senator WALLOP. Let me switch a little. I find your testimony interesting, but I find it inconsistent here and there. Maybe we can straighten me out.

I do not understand your tetracycline example. If 60 percent of the public believe that major corporations do price-fix, then what is your point? Is it to achieve that bias, and if the point is to try to achieve the bias, are we not complaining about what is complained about in the rest of your conclusions about 12-man juries?

Mr. SCHULMAN. I would first say that prejudice is an important element in civil trials, as well as in criminal trials. The U.S. Judicial Conference has argued that prejudice has no meaningful role in the solution to or adjudication of civil matters. I think otherwise, and I cited that example to make that point.

Then I went on to try to say that in many cases which involve civil disputes, there are strong prejudices in which society has an important interest. American society has a terribly important interest in the adjudication of civil antitrust cases, for example.

Then comes the question of how do you assure the parties in such a case of a fair and impartial jury trial. Under the current practices of Federal courts, it is very difficult. I do not believe the U.S. Government or the pharmaceutical companies in the tetracycline case are receiving a fair trial, but rather, prejudice is operating, I think, to the misfortune of society.

I think this is true of many important civil cases in the United States.

Senator WALLOP. Would it have been desirable to have a jury panel which reflected that 60 percent bias?

Mr. SCHULMAN. No.

Senator WALLOP. All right. That is what I was trying to ask.

Mr. SCHULMAN. It is not desirable, but if you have six people, rather than 12—and actually, Judge Lord empanelled two juries in that case, two 12-person juries—with the minimum voir dire that is required, and very few peremptory challenges, now it is three, and they want to reduce it to two, there is no way of winnowing that jury panel. That is the point I am trying to make.

Senator WALLOP. I appreciate that. That might make considerably more sense, especially on the basis of the peremptory challenge.

We were talking, a moment ago, about the 12 not being a magical figure, but at least a figure that seems, in practice, to be a number of people who are most inclined to achieve a goal. Yet, in one of the 9 reasons you give on Part B of your research, on 6 versus 12, showing overwhelmingly that 12 is better than 6, you come to the conclusion that 12 juries are more likely to hang. That seems less likely of accomplishing the goal.

Mr. SCHULMAN. That may be confusing. Let me explain it.

I think most trial lawyers will agree with this. I think it is desirable for juries to hang on cases when there is an impasse. There is a point in

many litigations—civil and criminal—where a jury should hang. The problem with six-people juries is that they almost never hang. Because of the group dynamics that operate, they move to a decision very quickly. And so the benefits that flow from the hung juror are lost in a six-person situation. It is very rare for a six-person jury to hang.

Senator WALLOP. Is there statistical evidence for that?

Mr. SCHULMAN. We have not done a study of the matter, but I have been talking now, for several years, to lawyers and judges on that issue, and it has been my experience and theirs—and it is also the experience of Dr. Podowa-Singer in her experimental work on 6 versus 12—that there is very little tendency for six-person juries to hang. But there has not been a systematic study of the issue.

Senator WALLOP. I am inclined to support your position on this, but it is a very definite statement for which there is no statistical back-up.

Mr. SCHULMAN. It is not the statistical background you are asking for, but the experimental work that Dr. Singer has done supports the proposition. But that is not a statistical study.

I should point out to the committee that it would be possible for the Federal Administrator of the court system to produce some interesting data. After all, for a long time, there were 12-person juries in civil cases. Many districts now, for the last few years, are having six-person juries.

It would be very interesting to look at the verdicts. That data exists. It is not on computer tapes, but it is in the files of the courts. It would be very interesting to put that on tape and look at it.

I think it would be irresponsible for the U.S. Congress to act on this without that kind of data.

Senator WALLOP. In essence, this is no different than I asked Mr. Imlay to provide us. If you can come across something like that through your organization, and if you can provide the committee with it, we would appreciate it.

Mr. SCHULMAN. We will, if we can.

Senator WALLOP. I have one last question, Mr. Chairman.

It would not be anything I would do—If I were persuaded of the merits of this bill—to eliminate the jury system entirely, or to create the judicial bureaucracy that you mentioned. The claim is that it will make the jury system more efficient.

You claim to have found inferences, at least within the Judicial Conference, that they would, in fact, like to get rid of it.

I wonder if you could also try to sort out some writings, or some reasoning that you have drawn from whatever sources, that would indicate some proof of legitimacy to that point?

Mr. SCHULMAN. Let me see if I understand. You would like——

Senator WALLOP. I would like something that would give reasons for your conclusion that the Conference would like to eliminate the jury system altogether. Maybe from documents in the Judicial Conference, or whatever, that tend to support this position.

Mr. SCHULMAN. I will do my best to provide you with a basis for that judgment.

Senator WALLOP. It is not a course I would like to embark on, but on the other hand, I think there should be some justification.

Mr. SCHULMAN. I agree.

Senator DeConcini. Thank you. I concur with Senator Wallop that that statement regarding the Judicial Conference does concern me. I do not dismiss it. I take your opinion very highly, based on your involvement in this area.

If you would care to help us feel more comfortable by substantive evidence as to how you draw that out, then I would like to see it.

I have heard those statements before by members of the bar, and members of the American Trial Lawyers Association, and so on. But this is my first opportunity to put my finger on it. I would feel better if you could help us in that area.

Mr. Schulman. Mr. Chairman, we would like to do that very much. I think it may be that we would want to put together as careful and as scholarly a piece of work on this as we can. So it may be that it may have to be beyond the point at which this particular bill is before you.

But I will do my best. I think it is terribly important to put something like this together.

Senator DeConcini. We will, in fact, ask Mr. Imlay to supply us, if he can, with any statistical information on 6-man juries versus 12-man juries. Perhaps he can help us there.

Mr. Schulman. I will be glad to do that.

Senator DeConcini. Mr. Kairys?

STATEMENT OF DAVID KAIRYS, ESQ., OF KAIRYS, RUDOVSKY & MAGUIGAN, PHILADELPHIA, PA.

Mr. Kairys. I appreciate the opportunity to come here.

I will summarize my statement, which I would like to be part of the record.

Senator DeConcini. Without objection, the material will be inserted in the record at this point.

PREPARED STATEMENT OF MR. KAIRYS

I am a practicing attorney from Philadelphia. I work with the National Jury Project, and I am Philadelphia counsel for the National Emergency Civil Liberties Committee. I have had considerable training in statistics, which I first applied to the problem of jury composition in a 1970 challenge to the selection system in the state courts in Philadelphia. I am the author of "Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study," 10 American Criminal Law Review 771 (1972) and, with statisticians Joseph B. Kadane and John P. Lehoczky, a recent article concerning jury source lists, "Jury Representativeness: A Mandate for Multiple Source Lists," 65 California Law Review 776 (1977) (hereinafter referred to as "Multiple Lists").

The amendments to the Federal Jury Selection and Service Act of 1968 set out in § 201 of S. 2074 would create a presumption that voter registration or actual voter lists represent a fair cross section of the community and seemingly prohibit use of additional lists unless there is a court finding that voter lists are not representative.

I am opposed to these amendments because they directly contradict the purpose of the Act and undermine the constitutional scheme and the legitimacy, integrity and impartiality of the judicial process.

First, the available data indicates that the proposed presumption is factually incorrect. The Census Bureau does a study of voting and registration after each election, and the following is a typical conclusion of these studies:

"[H]igher levels of registration and voting were associated with persons who were male, white, those in the middle age group (35–64), those persons with at least a high school diploma, those in families with incomes greater than $10,000, and those in white collar occupations. Conversely, females, Negroes, persons of Spanish ethnic origin, the youngest (18–34) and oldest age groups (65 or older),

those who did not complete elementary school education, those in families with incomes less than $5,000, and those in unskilled occupations, such as laborers and private household workers, were less likely to be registered and vote." Bureau of the Census, U.S. Dept. of Commerce, Voting and Registration in the Election of Nov., 1972, Series P–20, No. 253, at 1 (1973).

The available data from this and other studies is collected in Multiple Lists at 803–11 (see particularly Tables C and D, copies of which are attached to this statement). See also J. Van Dyke, "Jury Selection Procedures" (1977), at 88–93. In the 1976 election, 33 percent of those eligible were not registered and 41 percent did not vote. In the 1974 election, blacks were underrepresented on voter registration lists by about 12 percent and Spanish origin people by about 44 percent. People with lower incomes, laborers, service and blue collar workers, the unemployed, and younger people were grossly underrepresented. The figures are considerably worse for actual voter lists. If one looks at the studies over the last decade, it is also apparent that voter registration and actual voter lists are becoming more, not less, unrepresentative and underinclusive.

I do not see how Congress can presume that lists of registered voters or actual voters are representative of a fair cross-section and constitute presumptively valid single source lists unless Congress is prepared to proclaim the jury an upper middle class institution, from which it is presumptively proper to seriously underrepresent racial and ethnic minorities, laborers, service and blue collar workers, the unemployed, people with lower incomes, and younger people.

Second, the proposed presumption directly contradicts the purpose of the Act and confuses ends with means. The Act states, and the Constitution requires, that jury source lists and pools must represent a fair cross-section of the community. The existing provision concerning source lists provides, consistent with this purpose and the constitutional mandate, that voter lists shall be supplemented with other lists if voter lists are not representative of a fair cross-section of the community. Voter lists are a means, a list of names, for obtaining the end sought—which is representativeness.

The Act does not make voter registration a qualification for jury service, which it would be, presumptively at least, under the proposed amendment. Nor does the Act adopt the often-heard notion that voters are the "best" jurors.

"This argument reflects subjective, unsupported judgments about voters and nonvoters and a theoretical stance that directly contradicts basic constitutional and democratic principles.

"There is no factual support for the notion that almost one-half of our people who did not vote (or the third not registered) in the 1976 election are unconcerned, incompetent, or unintelligent. Moreover, the search for the "best" jurors, whether one believes them to be on voter registration lists or elsewhere, necessarily involves subjective judgments and intentional discrimination. It is not a legitimate basis for constructing or evaluating a jury system. From a societal and constitutional perspective, subjective notions of quality have no place in a jury selection system, and the best jury system is one that is representative of a cross section of the community." Multiple Lists, at 809–10. (footnotes omitted)

Third, the proposed amendment further confuses an already confused area by creating an undefined presumption and failing to provide standards of representativeness that support or defeat the presumption. All jury systems are, under existing law, presumptively valid in the sense that a challenger has the burden of proof of their invalidity. The amendment does not indicate whether or how the proposed presumption is different from this existing rule. The effect of such an undefined presumption will be to make it more difficult than it presently is, in some undefined way, to challenge the use of voter lists as unrepresentative. Judges may well feel that the amendment embodies some undefined, virtually blanket validation of voter lists. To court administrators, the amendment's message would seem to be that they can stick with voter lists and not worry about representativeness.

This is directly contrary to the purposes of the Act, constitutional requirements and important societal interests. From a societal perspective, and to the general public, unrepresentative sources and the unrepresentative jury systems, they spawn undermine the legitimacy, integrity and impartiality of the judicial process. If a source list—whether compiled from voter or other lists—is unrepresentative, the law should provide that it be corrected, not that it be allowed to hide and continue to exist behind an undefined presumption.

Finally, since the proposed presumption is not factually supportable and the methodology for use of multiple lists with little added cost or effort is available

and in use in many jurisdictions, see Multiple Lists, at 819–26 (Table E, at 823, lists jurisdictions that use multiple lists and the various systems they have adopted), the amendment serves no legitimate purpose.[1] Indeed, the Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States (April 7, 1976) in which the amendment was initially proposed, does not state or cite any factual basis for the presumption or discuss use of multiple lists. Rather, the Committee said, "This proposal is a response to the increasing number of cases challenging the process of jury selection." Id. at 9.

There are, of course, alternative ways to reduce the number of challenges,[2] foremost of which is to make source lists more representative, by requiring, as the Act now provides, that multiple lists be used when voter lists are not adequately representative. The court decisions denying these challenges, analyzed in detail in Multiple Lists, 799–801, 811–19, are not based on application of concrete or appropriate standards of representatives, and I believe it is fair to say that the courts have simply failed to enforce this provision of the Act. By this amendment, Congress is being asked to legislatively enshrine that failure by adopting an undefined presumption upon which judicial refusal to require representative sources can be based in the future.

Most of the proven unrepresentativeness in the court challenges is directly attributable to the unrepresentativeness of the voter lists used as the source. See Multiple Lists, at 803–4, particularly Table B, a copy of which is attached. There are many challenges largely because voter lists are often unrepresentative. The appropriate Congressional response to this is not to embrace unrepresentativeness or presume away the foundations of the Act. Such an approach would, in any event, spawn more challenges, since the amendment is inconsistent with the representativeness provisions of the Act and since the representativeness principle is constitutionally based as well as embodied in the Act. There would be fewer challenges—and a far better judicial process—if the existing provision concerning sources and supplementation with multiple lists were retained by Congress and implemented by court administrators and judges.

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[1] The amendment's seeming requirement of a finding of unrepresentativeness before a district court may use multiple lists also serves no legitimate purpose. The two districts that now use multiple lists have not made such a finding. There is no legitimate purpose in prohibiting those and other districts from making their source lists more representative without an explicit finding that the voter lists are unrepresentative.

[2] Another way is to adopt concrete standards of representativeness, as we recommend to courts and legislatures in Multiple Lists, at 788–99. This would have two important effects with regard to challenges: first, counsel would know whether or not there is a basis for a challenge; second, and more importantly, court administrators would know when their system is unlawful and open to challenge, and they would remedy the situation.

Table C

Representativeness and Inclusiveness of Voter Registration Lists Nationwide[159]

Category	1972 Election % Not on Registration Lists	1972 Election % Over- or Under-represented	1974 Election % Not on Registration Lists	1974 Election % Over- or Under-represented
Whole population	27.7	—	37.8	—
Sex				
Men	26.9	+1.0	37.2	+1.0
Women	28.4	−1.0	38.3	−0.8
Race				
White	26.6	+1.5	36.5	+2.1
Black	34.5	−9.4	45.1	−11.7
Spanish origin	55.6	−38.6	65.1	−43.9
Age				
18 to 20	41.9	−19.6	63.6	−41.5
21 to 24	40.5	−17.7	54.7	−27.2
25 to 29	33.9	−8.6	48.6	−17.4
30 to 34	28.8	−1.5	41.4	−5.8
35 to 44	25.2	+3.5	33.3	+7.2
45 to 54	20.7	+9.7	27.5	+16.6
55 to 64	19.8	+10.9	24.9	+20.7
65 to 74	21.5	+8.6	27.0	+17.4
75 and over	19.3	+11.6	34.8	+4.8
Education				
Years Completed				
Elementary				
0 to 4	51.8	−33.3	60.7	−36.8
5 to 7	40.5	−17.7	48.2	−16.7
8	32.0	−5.9	38.9	−1.8
High School				
1 to 3	37.0	−12.9	45.7	−12.7
4	26.0	+2.4	38.1	+0.5
College				
1 to 3	18.3	+13.0	33.1	+7.6
4	12.9	+20.5	25.2	+20.3
5 or more	11.2	+22.8	22.1	+25.2
Not enrolled in school				
18 to 20	50.3	−31.3	—	—
21 to 24	44.1	−22.7	—	—

159. All of the data presented in Tables C and D is derived from the Census Bureau's VOTING AND REGISTRATION IN THE ELECTION OF 1972 and VOTING AND REGISTRATION IN THE ELECTION OF 1974, *supra* note 151, and the categories listed were established and defined by the Census Bureau. "Percentage Not on Registration Lists" was calculated by subtracting the percentage that is registered, which appears in the Census Bureau studies, from 100%. "Percentage Over- or Underrepresented," on Table C, is measured by the comparative disparity standard, which reduces to

$$\left[1 - \frac{\text{Proportion of those in the specified category that are registered}}{\text{Proportion of the population that is registered}}\right] \times 100.$$

The proportion of those in the specified category that are registered and the proportion of the population that is registered appear in the Census Bureau studies. Underrepresentations are shown as negative and overrepresentations as positive. *See also* JURY SELECTION PROCEDURES, *supra* note 4, at App. F-I.

Category	1972 Election % Not on Registration Lists	1972 Election % Over- or Under-represented	1974 Election % Not on Registration Lists	1974 Election % Over- or Under-represented
Employment Status				
Agriculture				
Wage and salary	47.9	−27.9	50.2	−19.9
Self-employed	13.4	+19.8	19.1	+30.1
Nonagriculture industry				
Wage and salary	38.8	−15.4	40.0	−3.5
Self-employed	20.7	+9.7	28.7	+14.6
Government employed	15.6	+16.7	24.0	+22.2
Unemployed	42.7	−20.7	55.7	−28.8
Occupational Groupings				
White collar workers	17.6	+14.0	28.9	+14.3
Professional & technical	13.3	+19.9	25.3	+20.1
Managers & administrators	16.9	+14.9	25.9	+19.1
Sales	19.8	+10.9	31.2	+10.6
Clerical	21.0	+9.3	32.2	+9.0
Blue collar workers	35.1	−10.2	45.7	−12.7
Craftsmen	29.8	−2.9	40.8	−4.8
Operatives	39.3	−16.0	48.1	−16.6
Transport eqt. operatives	34.0	−8.7	39.7	−3.1
Laborers	40.1	−17.2	51.9	−22.7
Service workers	31.8	−5.7	41.9	−6.6
Private household workers	37.1	−13.0	44.6 (only women)	−10.9
Other	31.0	−4.6	41.7	−6.3
Farm workers	24.0	+5.1	29.6	+13.2
Farmers & Farm managers	11.2	+22.8	16.0 (only men)	+35.1
Farm laborers & foremen	43.4	−21.7	43.0	−8.4
Income				
Under $3,000	38.8	−15.4	—	—
$3,000 to $4,999	35.9	−11.3	—	—
Under $5,000	—	—	47.8	−16.1
$5,000 to $7,499	34.3	−9.1	—	—
$7,500 to $9,999	29.1	−1.9	—	—
$5,000 to $9,999	—	—	43.1	−8.5
$10,000 to $14,999	22.3	+7.5	35.3	+4.0
$15,000 and over	15.0	+17.6	—	—
$15,000 to $19,999	—	—	28.6	+14.8
$20,000 to $24,999	—	—	26.4	+18.3
$25,000 and over	—	—	22.4	+24.8

Table D

Inclusiveness of Voter Registration Lists: States and Metropolitan Areas[160]

State	Inclusiveness	% Not on Registration Lists	Metropolitan Area	Inclusiveness	% Not on Registration Lists
California	58.7	41.3	Atlanta, Ga.	62.3	37.7
Florida	56.1	43.9	Baltimore, Md.	61.8	38.2
Georgia	61.2	38.8	Boston, Mass.	68.7	31.3
Illinois	66.9	33.1	Chicago, Ill.	65.0	35.0
Indiana	69.6	30.4	Cleveland Ohio	66.2	33.8
Massachusetts	69.2	30.8	Dallas, Texas	52.5	47.5
Michigan	63.1	36.9	Denver, Colo.	67.2	32.8
Missouri	63.9	36.1	Detroit, Mich.	65.0	35.0
New Jersey	61.9	38.1	Houston, Texas	57.0	43.0
New York	57.8	42.2	Kansas City, Kan./Mo.	63.3	36.7
North Carolina	55.9	44.1	Los Angeles, Ca.	58.4	41.6
Ohio	60.6	39.4	Miami, Fla.	49.9	50.1
Pennsylvania	70.6	29.4	Milwaukee, Wis.	64.7	35.3
Texas	56.6	43.4	Minneapolis-St. Paul, Minn.	81.3	18.7
Virginia	54.0	46.0	Newark, N.J.	64.0	36.0
			New York, N.Y.	51.1	48.9
			Philadelphia, Pa.	67.7	32.3
			St. Louis, Mo.	64.3	35.7
			San Francisco, Ca.	60.4	39.6
			Washington, D.C.	54.8	45.2

Thus, voter registration lists are substantially unrepresentative and underinclusive. It has been suggested, however, that registration or actual voter lists are the most appropriate source because they include the "most concerned," "most competent," or "best" citizens. This argument reflects subjective, unsupported judgments about voters and nonvoters and a theoretical stance that directly contradicts basic constitutional and democratic principles.

There is no factual support for the notion that the almost one-half of our people who did not vote (or the third not registered) in the 1976 election are unconcerned, incompetent,[161] or unintelligent.[162] More-

160. *See* note 159, *supra.*

161. There is substantial evidence that the expert, "blue ribbon" or elite jury in fact yields no more quality or integrity of judgment than the representative jury. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 15-19, 88-93; Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970); *Implementation in the Fifth Circuit, supra*, note 27, at 349-50; S. REP. No. 891, 90th Cong., 1st Sess., 18-23 (1967).

162. Rather, the available evidence indicates that nonvoters view elections, the electoral or political process, the issues presented or ignored, and/or the choice presented by the candidates and major parties differently than voters. NON-VOTER STUDY 1976, *supra* note 150, at 3, concluded, based on a survey of nonvoters, that nonvoters have a "distrust of, and disaffection from major political and economic institutions, political leadership, and the media," not a lack of interest or concern. *See also* VOTING AND REGISTRATION IN THE ELECTION OF 1972, *supra* note 151, at 6; *Implementation in the Fifth Circuit, supra* note 27, at 350. The U.S. Commission on Civil Rights has concluded

Table B

Proportion of Unrepresentativeness of Various Jury Systems that is Attributable to Source Lists[148]

Court and Category Under-represented	% of Population	% of Source	% of Final Pool	Comparative Disparity of Final Pool (%)	% of Comparative Disparity of Final Pool Attributable to Source
1. Superior Court of Beauford County, North Carolina					
Race					
Blacks	30.2	18.9	17.0	−43.7	85.6
2. U.S. District Court for the Eastern District of Pennsylvania					
Age					
Under 30	25.5	17.2	18.6	−27.1	100.0
Under 40	41.8	32.2	33.3	−20.3	100.0
Race					
Nonwhites	15.7	11.7	12.8	−18.5	100.0
3. U.S. District Court for the Northern District of Florida					
Race					
Blacks	22.8	16.3	16.0	−29.8	95.6
4. Supreme Court of New York, Erie County					
Race					
Blacks	8.4	6.5	5.1	−39.3	57.6
Age					
21 to 29	20.7	4.5	3.4	−83.6	93.6
Sex					
Women	53.0	53.0	16.7	−70.4	0.0

148. The data presented in the first three columns of Table B was submitted to the courts listed in challenges to the jury selection systems in the following cases:

1) State v. Little, No. 74 Cr. 4176, (Super. Ct. of Beauford County, N.C. 1975). The source was voter registration and tax lists (with no rules or established procedures for using the two lists together; see text accompanying notes 218-49 *infra*). The figure presented for the proportion of the source that is black, 18.9%, was for the voter registration list alone; the figure for the tax list was not known, but testimony established that it was lower than the corresponding figure for the voter registration list. The proportion of underrepresentation of blacks attributable to the source was therefore actually greater than the table indicates. Venue was changed before the challenge was resolved. *See generally* Michael, Mullin, O'Reilly & Rowan, *Challenges to Jury Composition in North Carolina*, 7 N. CAROLINA CENT. L.J. 1 (1976).

2) United States v. Saxe, Crim. No. 75-236 (E.D. Pa. 1976). The source was voter registration lists. The figures indicate that the process served to make the system more representative. The defendant pled guilty before a decision on the jury challenge was rendered.

3) United States v. Briggs, 366 F. Supp. 1365 (N.D. Fla. 1973). The source was

Mr. KAIRYS. I have made four basic points in that statement.

First of all, I am addressing S. 2074, section 201, which creates a presumption that voter lists provide a proper cross-section of the community. There is available data, and this data indicates that the presumption is simply wrong, and it is getting wronger.

What I mean by that is that in every election we have had, the voter lists of the past 10 years have become less representative of the community. I am basing that on studies done by the Census Bureau.

They do a study after every election called "Voting and Registration in the Election [year]." They have stated the same conclusions regarding the unrepresentativeness of the voter registration lists for the last 10 years. Those are cited in our article in the California Law Review, and referred to in the statement that you have made part of the record.

I think there is data, also, as Mr. Imlay said, in the possession of the Administrative Office of U.S. Courts. Unfortunately, that data has never been made public. We would have liked to have that data, as a matter of fact, when we prepared this article. We asked for it.

The Administrative Office's data is regarded by them as confidential. I am talking about the data that is gathered from the samples that he referred to of each district court. I see no reason why that should be confidential. We should all have that. Certainly the subcommittee should have it.

Also, I have spoken to people who have seen the Administrative Office's data. They have reached an entirely different conclusion than Mr. Imlay. Since I haven't seen the data, I am at a disadvantage, but I can offer an important caution. Mr. Imlay referred to the outdated nature of the 1970 census, and anyone using the 1970 census should modify the data to account for changes since 1970 and the undercount of minority and other people recognized by the Census Bureau itself. But if the data have been used properly and is accurate, I would imagine it would present the same results as the Census Bureau's voting studies—which do not depend on the 1970 census—that voter lists are not representative of a cross section of the community.

I believe this proposed amendment is also one of the ways, as Dr. Schulman said, that the Judicial Conference and the Administrative Office of U.S. Courts are basically chipping away at the jury system as a whole.

A good example of that, I think, is provided by the initial report of the Committee on the Operation of the Jury System of the Judicial Conference that led to this proposed amendment. It does not refer to any data that supports the proposition that voter lists are, in fact, representative. There is no support cited, no study cited.

The only thing it says is that there have been a few court challenges, to, source lists, and there is a footnote with cites to a handful of them. These challenges have been based on the present provision concerning source lists and the Constitution.

Certainly there have been challenges, because voter lists are unrepresentative.

If you are a counsel in a case—in any particular case, but certainly in a case that involves a question of, say, race or ethnic background, and your client is of one race or ethnic background, and that may be

an issue in the case—of course you would file a challenge if the source list is unrepresentative.

The appropriate response to that—to the challenges and to unrepresentativeness, where it exists—is embodied in the act as it is now stated. The act does not state any extreme proposition. All it says, right now, is that the voter lists are the primary source, and if they are not representative, then they must be supplemented.

This presumption that they have advocated is totally undefined. I still have not heard from Mr. Imlay's testimony what it means. What is it a presumption of?

I start from the proposition in any jury composition challenge—and this is the rule in State and Federal courts throughout the country—that all jury systems are presumed valid, in the sense that the burden of proof of invalidity rests with the challenger. All jury systems come in with a presumption of validity. I presume the voter registration list has the same presumption.

What beyond that do they mean by this presumption? It seems to me they are giving a very undefined and vague message to the judges and to the administrators. To the judges, it is going to mean: "Don't worry about these challenges. Throw them out, based on our presumption." And to the administrators it means: "Don't even consider using multiple lists. You don't have to bother with examining the representativeness of the voter lists in your area or considering supplementation. Just stick with voter lists."

I cannot put any other definition on this presumption. It has no meaning for me.

Senator DeConcini. Mr. Imlay indicated that it went further than that in the sense, if I recall his testimony, that this does not preclude the judge, at any time, from making his own determination. That is, whether or not the list should be supplemented.

So, you still have the protection that the judge can do that now.

Mr. Kairys. They can do that.

That really refers to the second part of the amendment. The first part creates a presumption, and the second part says that there could be supplementation, but only with a specific finding of unrepresentativeness.

The two districts that supplement the voter lists right now do not do so based on a specific finding of unrepresentativeness. I take that provision to be addressed at those two districts and to wipe out the only two that have seen fit to supplement.

I am sure you can understand that sometimes judges are unwilling or hesitant to make such a finding. It seems to me unnecessary to require that specific finding on the record.

Senator DeConcini. Let me pursue that. What is the logic of that? If you are not willing to make a finding which is nonrepresentative, then what is the cause for supplementing the list?

Mr. Kairys. What if you were willing to make it more representative, without making any findings? Why should we discourage a district which wants to make its source list more representative than it presently is, even though it is not necessarily convinced that the voter list is terrible? It takes the words "finding of unrepresentativeness" to mean that voter lists are absolutely not representative of the community. It is undefined and has that tone to it.

If there is a district—and apparently there are already two—which wants to supplement and make its source list more representative, which is a goal I think we all agree on, then why not let them do it? This would be without making the finding, if they do not wish to do so.

Senator WALLOP. How do you respond to Mr. Imlay's statement that to introduce another element, like drivers' license or utility rate lists, skews the representativeness?

Mr.. KAIRYS. I was frankly disappointed that the Office of Administration of the U.S. Courts was so out of touch with what is happening across the country on this question.

It is true that there are only two district courts that have supplemented, but I think there is a definite trend among the State courts.

We have a table of the courts that have adopted multiple lists in our article. I think there is a definite trend toward use of multiple lists. It is a trend that anyone could understand, because the voter lists are becoming more and more unrepresentative.

I think Mr. Imlay is right to point out that some additional lists can make the source less representative. That is a valid caution which we talk about in the article. One must be careful about which list you choose, because you could wind up making the situation worse. But that is a reason to be careful in choosing the lists, not to abandon use of multiple lists.

The only example that he referred to, when you asked him what kind of a problem exists about the challenges, was the District of Colorado. The way they found in Colorado to correct the situation was not to abolish the ability to make challenges, which this amendment seems aimed to do, but was to adopt a multiple list. They adopted the driver's license list as the secondary list.

By the way, I think the Colorado multiple lists are shared by the State courts and the Federal courts, which minimizes the cost. It was done on a statewide basis. With the voter and licensed drivers lists, as I understand it, they came up with more people—other eliminating duplicates—than the census found. The census had, I believe, 10 percent fewer names than they found with the two lists.

The experience I have had is this. With the data I have seen, and my coauthors have seen, drivers' license lists often double the number of nonduplicated names that are on the voter lists.

Many courts have supplemented with licensed drivers lists. It is a particularly good one because it usually does not raise the problem that Mr. Imlay referred to.

There are some lists—like city directories and telephone and utility lists—that often have the same underrepresentations that voter lists do. If you supplement with something like that, then you would not be accomplishing much.

The drivers' license lists usually bring in a lot of young people. Young people are terribly underrepresented in the voter lists.

The drivers' license list usually makes the source—I cannot say always because you have to examine each situation—sufficiently representative of young people.

I think the whole question of challenges boils down to this. If someone challenges something that is wrong, or that is contrary to our basic concepts, we cannot mechanically slap down the challenge.

We should look at whether the challenge is right or wrong, and if it is right, we should correct the situation.

I think the way we should go, really, is in the other direction from what Mr. Imlay has urged. We should encourage multiple lists, encourage the courts that have done it, and encourage more to do it.

The methodology is there to do it cheaply, and with very little effort, at this point.

I think they are really pushing you in the wrong direction.

I will conclude my opening remarks with that, and see if there are any questions.

Senator DeConcini. Let me ask you a question about the Uniform Jury Selection Act used by a number of States. Has there been any indication that the use of such lists has increased or decreased the number of situations in which the jury selection system has been challenged as being unrepresentative?

Mr. Kairys. I cannot say for sure. I do not know of any challenge in a Uniform Jury Selection Act State. I know Colorado had a lot of trouble before it adopted the Uniform Act. Since it has been adopted, I do not know of any litigation, but I cannot say there has not been any.

Senator DeConcini. How many State courts are now using the multiple list approach, do you know?

Mr. Kairys. It is a little difficult to say because some of the States did it statewide, and some individual counties in some States did it on their own. There are four or five States that have done it around the whole State. Then there are a whole assortment of maybe 15 or so individual counties which have done it. This information is presented in a table in our article.

Senator DeConcini. Would you care to incorporate that article in the record.

Mr. Kairys. I would.

Senator DeConcini. We would be pleased to have it. Without objection, it will be inserted in the record at this point.

[Material supplied:]

Jury Representativeness: A Mandate for Multiple Source Lists

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Most of the unrepresentativeness in our jury systems is attributable to the unrepresentativeness of the source lists, which are usually compiled only from voter registration lists. This Article argues that the Constitution mandates representative and inclusive jury selection processes. It attempts to quantify standards for inclusiveness and representativeness, and suggests inexpensive means by which these goals can be achieved through the use of multiple lists.

Introduction

Challenges to jury systems that do not represent the community have increased significantly in the last several years.[1] This phenomenon has occurred not only in the South, but across the country, and, though reforms were instituted by the Federal Jury Selection and Service Act of 1968,[2] federal as well as state jury systems have been challenged for their unrepresentativeness.[3]

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1. Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States 9 (April 7, 1976) [hereinafter cited as Report]. For a general discussion of the standards applicable to jury challenges, see National Jury Project, The Jury System: New Methods for Reducing Prejudice 5-24 (1975) (available from the National Jury Project, 2054 University Ave., Berkeley, California 94704) [hereinafter cited as Jury System]; Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975) (appendix to the opinion by Judge Walter P. Gewin) [hereinafter cited as Foster Appendix]; Kairys, *Juror Selection: The Law, a Mathematical Method of Analysis, and A Case Study*, 10 Am. Crim. L. Rev. 771 (1972) [hereinafter cited as *Juror Selection*].

2. 28 U.S.C. § 1861, *et seq.* [hereinafter cited as the Federal Act].

3. Report, *supra* note 1, at 9.

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Analysis of the evidence presented in support of these challenges reveals that most of the proven unrepresentativeness is attributable to the source list.[4] Indeed, statistical data indicates that no single available list, including voter registration lists, the most widely used source,[5] adequately represents a cross section of our communities.[6] In recognition of this problem, the Federal Act provides that while voter lists are to be the primary source, federal courts "shall prescribe some other source or sources . . . where necessary to foster the policy [of representation of a cross section],"[7] and the Uniform Jury Selection and Service Act, adopted in five states,[8] makes the use of multiple lists mandatory.[9]

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4. See Table B and the text accompanying notes 146-57 *infra*; J. VAN DYKE, JURY SELECTION PROCEDURES 89 (1977) [hereinafter cited as JURY SELECTION PROCEDURES]. The only major exception is in cases where the selection process is systematically discriminatory, which was not the basis of the overwhelming majority of challenges. Cases in which the process is systematically discriminatory fall into two categories, both of which commonly involve claims of discrimination against women. In the first, selection officials have actively discriminated against a cognizable class: for example, in People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974), selection officials admitted that they picked more men than women from the source list (the pool was reconstituted using a nondiscriminatory procedure). Second, qualifications, exclusions, exemptions, and excuses can be discriminatory, either facially or as applied. For example, women are systematically discriminated against and discouraged from serving by various facially neutral but sex-based exemptions nominally linked to child care. *See* Taylor v. Louisiana, 419 U.S. 522 (1975). *See generally* Copelon, Schneider & Stearns, *Sex Discrimination in Jury Selection*, 2 WOMEN'S RTS. L. RPTR. 3 (1975) (the authors discuss the constitutional issues raised by such exemptions and point out that most people who are offered an exemption take it and that a large proportion of the women with children who claim the exemption are employed outside the home).

5. The Federal Act, *supra* note 2, provides for use of voter registration or actual voter lists. 28 U.S.C. § 1863(b)(2). Most state courts also use voter registration or actual voter lists. *See* National Center for State Courts, *Facets of the Jury System: A Survey* (1976), Table C (available from NCSC, 1660 Lincoln St., Suite 200, Denver, Colorado 80203) [hereinafter cited as *Facets of the Jury System*]. Sixteen states in New England and the South still use the "key man" system or some variation, where selection officials have discretion to choose people they know or hear about. JURY SELECTION PROCEDURES, *supra* note 4, at 86-87.

6. This conclusion is based on data concerning the entire nation and many states and urban areas. See text accompanying notes 149-57 *infra;* JURY SELECTION PROCEDURES, *supra* note 4, at 85-106. It is possible that in some areas voter registration lists, or some other single list, are sufficient, and in such areas it would not be necessary to use multiple lists.

7. 28 U.S.C. § 1863(b)(2).

8. COLO. REV. STAT. ANN. § 13-71-101 *et seq.* (1973); IDAHO CODE § 2-201 *et seq.* (1948); IND. STAT. ANN. § 33-4-5.5-1 *et seq.* (Burns 1975); MISS. CODE § 13-5-2 *et seq.* (Cum. Supp. 1976); NO. DAK. CENT. CODE § 27-09.1-01 *et seq.* (1974).

9. UNIFORM JURY SELECTION AND SERVICE ACT [hereinafter cited as UNIFORM ACT] § 5. Mississippi and Indiana have modified § 5 of the Uniform Act. MISS. CODE, § 13-5-8(1) provides for exclusive use of voter registration lists. IND. STAT. ANN. § 33-4-5.5-7 (Burns 1975) provides for multiple lists but applies only to counties with a population of from 500,000 to 600,000 according to the 1970 census.

At present only two federal district courts[10] and several state courts[11] utilize multiple lists, and no court has either required multiple lists or supplemented a primary list on constitutional or statutory grounds.[12] Most decisions[13] require proof of purposeful discrimination in jury selection, even though constitutional[14] and statutory[15] authority indicates that proof of a significant disparity between the composition of the population and the source or pool constitutes a prima facie case of invalidity. Other cases require proof that the underrepresentation resulted in a "substantial impact" on the absolute number of minority members serving on a panel,[16] rendering challenges based on the underrepresentation of small or medium-sized minorities impossible.[17] The Committee on the Operation of the Jury System of the Judicial Conference of the United States recently suggested, in response to the increase in challenges, that the Federal Act be amended to "establish a presumption that names of prospective jurors contained in voter lists represent a fair cross-section of the community."[18] There is, however, no factual basis for such a presumption.[19]

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10. The two federal district courts are the United States District Court for the District of Colorado and the United States District Court for the District of Columbia. See note 199 *infra*.

11. See Table E *infra*.

12. *But see* Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. 1974); United States v. Grant, 471 F.2d 648 (4th Cir. 1973), *rehearing denied*, 475 F.2d 581 (1973) (Winter, J., dissenting). One court has invalidated use of voter registration lists as the sole source, but the decision was quickly reversed by an appellate court. People v. Taylor, No. A-277-425 (Super. Ct. for Los Angeles County, Oct. 11, 1974), *vacated*, Civ. No. 45230 (Cal. Ct. App., 2d Dist., Nov. 26, 1974).

13. *E.g.*, United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973); United States v. Gordon, 455 F.2d 398 (8th Cir. 1972); United States v. Ross, 468 F.2d 1213 (9th Cir. 1972); United States v. Dangler, 422 F.2d 344 (5th Cir. 1970). For an analysis of the legislative history of the federal supplementation provision, see note 198 *infra*.

14. Taylor v. Louisiana, 419 U.S. 522 (1975); Turner v. Fouche, 396 U.S. 346 (1970); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

15. 28 U.S.C. § 1861; H.R. REP. No. 1076, 90th Cong., 2d Sess. 8 (1968); S. REP. No. 891, 90th Cong., 1st Sess. 9 (1967). *See* Taylor v. Louisiana, 419 U.S. 522, 529 (1975); United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. McDaniels, 370 F. Supp. 298, 301 (E.D. La. 1973), *aff'd* 509 F.2d 825, *cert. denied*, 423 U.S. 857 (1975).

16. United States v. Goff, 509 F.2d 825 (5th Cir. 1975), *cert. denied*, 423 U.S. 857 (1975); United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

17. United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Freeman, 514 F.2d 171 (8th Cir. 1975).

18. REPORT, *supra* note 1, at 9. The proposal also prohibits use of multiple lists unless there is a specific finding that voter lists are not representative. Since the two federal districts now using multiple lists have explicitly provided in their plans that their use of multiple lists was not based on such a finding, the proposal would have the effect of invalidating the use of multiple lists in these districts.

19. The Committee's report does not state or refer to any factual basis; rather,

A number of factors are responsible for the failure of the courts to require use of multiple lists to correct unrepresentative selection systems. First, there is confusion over the constitutional standard to be applied. Since the 1940's the courts have required that jury pools and source lists be representative of a cross section of the community.[20] The Federal Act[21] and many state statutes[22] contain the same or a similar requirement. Nevertheless, courts have tended to analyze disparities between the composition of the population and the source list under a purposeful discrimination test, rather than a representativeness test.[23] Second, there are no accepted standards for evaluating the representativeness of source lists or pools. Neither courts nor legislatures have established criteria for distinguishing allowable from impermissible deviations from the cross-sectional ideal.[24] Third, though inadequate source lists cause most of the unrepresentativeness, they have received insufficient attention in challenges and court decisions because of a lack of available data[25] and the unquestioned notion that voters are the "best" or "most concerned" citizens.[26] Last, there has been no available methodology for implementing multiple list systems with reasonable costs and effort.[27]

These obstacles to representative source lists and jury pools should no longer prevent implementation of the cross section of the community

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the Committee said: "This proposal is a response to the increasing number of cases challenging the process of jury selection." *Id.*

20. Taylor v. Louisiana, 419 U.S. 522 (1975); Turner v. Fouche, 396 U.S. 346 (1970); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

21. 28 U.S.C. § 1861.

22. *E.g.*, COLO. REV. STAT. ANN. § 13-71-102 (1973).

23. Castaneda v. Partida, 97 S. Ct. 1272 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972).

24. For a general discussion, see *Juror Selection, supra* note 1, at 772-79; Foster Appendix, *supra* note 1, at 818-19, 833-35. The Federal Act sets "substantial deviation" as the standard, 28 U.S.C. § 1861, but the definition and content of this provision was left to judicial determination. See S. REP. No. 981, 90th Cong., 1st Sess., 11 (1967); H.R. REP. No. 1076, 90th Cong., 2d Sess., 5 (1968).

25. *See Foster Appendix, supra* note 1, at 817.

26. *See* United States v. Test, 550 F.2d 577 (10th Cir. 1976); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969). This notion is directly contrary to the cross-sectional principle and is of questionable factual validity. See text accompanying notes 160-65 *infra.*

27. Judge Walter P. Gewin, although recognizing the need for more representative sources, has stated that "there is no facile way to supplement voter registration lists." Gewin, *The Jury Selection and Service Act of 1968; Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 383 (1969) [hereinafter cited as *Implementation in the Fifth Circuit*]. Later, Judge Gewin proposed use of the old "key man" system as the only practical method of supplementation. Gewin, *Should Guidelines be Established for Determining When District Courts Should Use Other Sources of Names of Prospective Jurors in Addition to Voter Registration Lists or Lists of Actual Voters; and, if so, What Guidelines Should be Used*, COMMITTEE ON THE OPERATION OF THE

principle. Although there is still considerable controversy concerning the theoretical basis of the jury selection cases, the Supreme Court recently confirmed[28] that a significant underrepresentation establishes a prima facie case of invalidity. Various measures of representativeness have been proposed, and there is a firm legal and factual basis for adoption of a definitive standard. The necessary data is available.[29] The methodology for using multiple lists at minimal added cost or effort has been developed,[30] and is being utilized in several jurisdictions.[31] All that remains is a traditional judicial task: standards must be formulated and adopted, and the constitutional and statutory mandates must be enforced.

This Article traces the theoretical framework of the jury selection cases and the various standards that have been proposed as measures of representativeness. Next the guiding constitutional and statutory principles are applied to the problem of source lists and the available data concerning voter registration and other lists is presented. Finally, available methodologies for the easy and inexpensive use of multiple lists are discussed.

I

The Constitutional Mandate of Representativeness

Representativeness as a constitutional requirement for jury selection has been derived piecemeal following ratification of the fourteenth amendment.[32] In *Strauder v. West Virginia*,[33] the first successful challenge to a jury selection system, the Supreme Court invalidated a state statute that prohibited blacks from serving on grand or petit juries. Subsequent decisions vindicated challenges to de facto total exclusion of blacks[34] and underrepresentation of blacks[35] and of other "cognizable" groups.[36] The Court first articulated the affirmative princi-

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Jury System of the Judicial Conference of the United States, The Jury System in the Federal Courts, 1966-1973 at 109 (1974) [hereinafter cited as Works].

28. Castaneda v. Partida, 97 S. Ct. 1272 (1977).

29. See text accompanying notes 145-60.

30. *See* Kadane & Lehoczky, *Random Juror Selection from Multiple Lists*, 24 Operations Research 207 (1976) [hereinafter cited as *Multiple Lists*].

31. See Table E *infra*.

32. On the historical development of the jury selection cases, see generally *Juror Selection, supra* note 1, at 772-77.

33. 100 U.S. 303 (1880).

34. Norris v. Alabama, 294 U.S. 587 (1935).

35. Smith v. Texas, 311 U.S. 128 (1940).

36. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Hernandez v. Texas, 347 U.S. 475 (1954). For a general discussion of the standards for determining cognizable classes and the various groups recognized, see Jury System, *supra* note 1, at 10-14. Under either the representativeness or discrimination theories discussed here, it is appro-

ple[37] that juries be drawn from a "cross-section of the community" in *Thiel v. Southern Pacific Co.*,[38] decided in 1946. Although *Thiel* concerned a federal jury and the decision rested upon the Court's supervisory power,[39] the cross section requirement is now firmly established as a constitutional principle applicable to state as well as federal selection systems.[40]

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priate to require relief concerning only particular categories in the population, although less stringent standards of cognizability are more consistent with the representativeness principle. For example, underrepresentation of or discrimination against left-handed people would not raise a constitutional question under either theory, but underrepresentation or discrimination on the following bases clearly should: race, ethnicity or ancestry, economic, occupational, social or class status, religious beliefs, sex, age, geography and political beliefs or values. *See* JURY SYSTEM, *supra* note 1, at 10-13.

The decisions concerning whether young people are a cognizable class are inconsistent. *Compare* United States v. Butera, 420 F.2d 564 (1st Cir. 1970)(age is a cognizable class) *and* Simmons v. Jones, 317 F. Supp. 397 (S.D. Ga. 1970) (indicating age is a cognizable class) *with* United States v. Allen, 445 F.2d 849 (5th Cir. 1971)(age is not a cognizable class) *and* United States v. Kuhn, 441 F.2d 179 (5th Cir. 1971) (age is not a cognizable class). Application of traditional standards of cognizability to the available evidence leads to the conclusion that young people constitute a cognizable class. *See* JURY SYSTEM, *supra* note 1, at 12-13; JURY SELECTION PROCEDURES, *supra* note 4, at 35-39.

37. The principle was suggested in Smith v. Texas, 311 U.S. 128 (1940). It has been traced back as far as Tudor England. *See* I. HOLDSWORTHY, A HISTORY OF ENGLISH LAW 339-47 (1956); Note, *The "Blue-Ribbon" Jury*, 60 HARV. L. REV. 613 (1947). The Magna Carta, Chp. 39, guaranteed a jury of one's peers, which meant a jury of persons from the same class, legal status, or caste as the accused. *See* W. MCKECHNIE, MAGNA CARTA 378 (2nd ed. 1914) (the "peers of a Crown tenant were his fellow Crown tenants"). *See also* Labat v. Bennett, 365 F.2d 698, 711 (5th Cir.) (en banc), *cert. denied*, 386 U.S. 991 (1966); 4 BLACKSTONE COMMENTARIES 349 (Tucker 1803). The *Strauder* Court clearly had this tradition in mind:

> The very idea of a jury is a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine: that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

100 U.S. at 308.

38. 328 U.S. 217, 220 (1946). Unless the jury represents a cross-section, the Court noted, there is a danger that it will become "the instrument of the economically and socially privileged" and representative of "narrow class interests." *Id.* at 223-24.

39. *Id.* at 219.

40. Taylor v. Louisiana, 419 U.S. 522 (1975); Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Witherspoon v. Illinois, 391 U.S. 510 (1968); Glasser v. United States, 315 U.S. 60 (1942) (federal jury); United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969); Witcher v. Peyton, 405 F.2d 725 (4th Cir. 1969) ("[t]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. . . . It is a democratic institution . . . ." *Id.* at 727); Labat v. Bennett, 365 F.2d 698 (5th Cir.) (en banc), *cert. denied*, 386 U.S. 991 (1966); Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414 (3d Cir. 1955) (federal jury); King v. Cook, 298 F. Supp. 584 (N.D. Miss. 1969); Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1968); Allen v. State, 110 Ga.

The representativeness principle furthers important societal interests in addition to the right of litigants to a fair trial and the right of citizens to serve on juries.[41] The concept of the jury as representative of a cross section of the community has long been linked both to notions of representative government and democracy and to the constitutional guarantees of due process, equal protection, and trial by an impartial jury.[42] The jury provides a vehicle for direct citizen participation in an arena otherwise dominated by professional advocates and government officials. In criminal cases, the jury performs a protective function, interposing a group of citizens between an accused and the punitive mechanism of the state.[43] Thus the representative, popular character of the jury lends legitimacy, integrity, and impartiality[44] to the judicial process.[45] A lack of representativeness tends to compromise the jury as an institution and to undermine the judicial process.[46] The

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App. 56, 137 S.E.2d 711 (1964); Michigan v. Viera, Nos. A-152-598 and A-152-697, Recorders Ct. for the City of Detroit (April 30, 1970).

41. The Court has approved affirmative civil suits by members of an underrepresented group to vindicate their right to serve as jurors. Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970). Other affirmative actions have been successful. Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969); Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1968); and White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).

42. Taylor v. Louisiana, 419 U.S. 522 (1975); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). In Smith v. Texas, 311 U.S. 128 (1940) the Court said:

> For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of democratic society and a representative government.

Id. at 130. *See also* Fay v. New York, 332 U.S. 261, 299 (1947) (Murphy, J., dissenting); Glasser v. United States, 315 U.S. 60 (1942).

43. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

44. Cross-sectional jury systems yield impartiality in the only sense that concept can have real meaning concerning the pool from which the jury is to be drawn. No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses. Cross-sectionality yields impartiality in the sense that, at least before cause and peremptory challenges, the wide variety of attitudes and life experience in the community are represented and the particular perspectives of any particular group will be prevalent in proportion to that group's numbers in the population.

45. *E.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

46. Taylor v. Louisiana, 419 U.S. 522 (1975); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). In *Taylor*, the Court said:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S. at 155-156, ... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent

Court has uniformly ruled since 1940 that the right to representativeness is fundamental,[47] comparable in importance to the right to vote,[48] and cannot be "overcome on merely rational grounds."[49]

Nevertheless, standards governing challenges to jury selection systems have usually been formulated in terms of prohibiting discrimination[50] rather than requiring representativeness. This theoretical choice has significant consequences. If discrimination is the focus, the actions, intent, and perhaps even motives of selection officials are crucial in determining the validity of the selection system. If representativeness is the guiding principle, state and federal governments have a duty to provide representative sources and pools, and the presence or absence of discriminatory intent is irrelevant.

This distinction is unimportant when the challenger proves actual discrimination, for then a violation of both principles has been established. When the challenger has proved "systematic" or "intentional" discrimination by selection officials at any stage, the jury system is presumptively invalid even if the resulting disparity between the composition of the pool and the population is minimal[51] or, in some cases, even

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with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civil responsibility.' Thiel v. Southern Pacific Co. 328 U.S. 217, 227, . . . (Frankfurter, J., dissenting).

419 U.S. at 530-31.

47. Taylor v. Louisiana, 419 U.S. 522 (1975); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Smith v. Texas, 311 U.S. 128 (1940). In *Taylor*, the Court said:

> The unmistakable import of this Court's opinions, at least since 1940, Smith v. Texas, . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.

419 U.S. at 528.

48. Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970).

49. Taylor v. Louisiana, 419 U.S. 522, 534 (1975).

50. *E.g.*, Castaneda v. Partida, 97 S. Ct. 1272 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Hill v. Texas, 316 U.S. 400 (1942).

51. *E.g.*, Cassell v. Texas, 339 U.S. 282 (1950); Avery v. Georgia, 345 U.S. 559 (1953); Arnold v. North Carolina, 376 U.S. 773 (1964); People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974) (selection officials admitted that they discriminated against women in picking names from voter lists; the selection system was invalidated even though their purpose was to minimize administrative tasks since state law provided for a women's exemption which women often claimed). *See also* Brooks v. Beto, 366 F.2d 1, 22 n.40 (5th Cir. 1966); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967).

if there is no disparity.[52] Thus in *Cassell v. Texas*[53] the Court invalidated a jury system in which there was a proportional limit on the number of blacks although the resulting disparity was not considered large and could be justified. In such cases, good faith or a nondiscriminatory purpose on the part of the selection officials does not save the jury system.[54] For example, where selection officials have intentionally chosen two men for every woman chosen, the selection system is invalid even though selection officials chose more men than women for administrative convenience since women usually ask to be excused.[55] These rules are considered to be well established.

There has been considerable confusion, however, when the challenger relies solely or mainly on proof of a significant disparity between the composition of the population and that of the source or pool.[56] Such proof establishes that the representativeness principle has been violated, but does not explain the reason for the unrepresentativeness or directly establish discriminatory actions, intent or motive on the part of selection officials.

In *Turner v. Fouche*, after finding that there was a substantial disparity, the Court stated that the challengers had "further demonstrated that the disparity originated, at least in part, at the one point in the selection process where jury commissioners invoked their subjective judgment rather than objective criteria."[57] In *Alexander v. Louisiana*, the Court stated that the challenger's prima facie case rested on proof of a substantial disparity and a "clear and easy opportunity for racial discrimination."[58] These decisions led to confusion as to whether proof of an opportunity to discriminate is a necessary element of a prima facie

52. In Williams v. Georgia, 349 U.S. 375 (1955), the Court invalidated a jury system based on "the system of selection and the resulting danger of abuse . . . and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists." *Id.* at 382.

53. 339 U.S. 282 (1950). Three independent grounds were urged by the challenger: the disparity, the imposition of a proportional limit on the number of blacks, and the failure of the "key men" to familiarize themselves with black people. The Court found the disparity insubstantial and justifiable but ruled that each of the remaining claims was sufficient to invalidate the jury system.

54. Taylor v. Louisiana, 419 U.S. 522 (1975); Alexander v. Louisiana, 405 U.S. 625 (1972); Arnold v. North Carolina, 376 U.S. 773 (1964); Avery v. Georgia, 345 U.S. 559 (1953); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

55. United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974).

56. *See* the majority and dissenting opinions in Castaneda v. Partida, 97 S. Ct. 1272 (1977); Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Black v. Curb, 422 F.2d 656 (5th Cir. 1970).

57. 396 U.S. 346, 360 (1970).

58. 405 U.S. 625, 630 (1972).

case based on a substantial disparity.[59] The most recent decision, *Castaneda v. Partida*,[60] indicates that it is not. The Court, while discussing the opportunities for discrimination inherent in the selection system, stated that proof of such opportunity merely "supports" the prima facie case established by proof of a substantial disparity.[61] In *Partida*, the challenger proved that Mexican-Americans constituted 79.1% of the population and only 45.5% of the grand jurors.[62] The source list for grand jurors was compiled by the "key man" system, in which "key" people select jurors from persons they know or hear about. This system presents officials with an obvious opportunity to discriminate. Nevertheless, the Court explicitly stated that the substantial disparity alone established a prima facie case:

> [A] selection procedure that is susceptible to abuse or not racially neutral supports the presumption of discrimination raised by the statistical showing. . . . Once the defendant has shown substantial underrepresentation of his group, he has made out a *prima facie* case of discriminatory purpose, and the burden then shifts to the State to rebut that case.[63]

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59. In several early decisions, the opportunity to discriminate was an independent basis for invalidating a jury system and was usually analyzed in the framework of the systematic exclusion line of cases. *See, e.g.*, Williams v. Georgia, 349 U.S. 375 (1955); Avery v. Georgia, 345 U.S. 559 (1953). Courts then began to view a prima facie case based on a substantial disparity as bolstered by proof of an opportunity to discriminate. Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Sims v. Georgia, 389 U.S. 404 (1967); Whitus v. Georgia, 385 U.S. 545 (1967); Witcher v. Peyton, 405 F.2d 725 (4th Cir. 1969); Lampkin v. Smith, 309 F. Supp. 1325 (N.D. Ga. 1970); Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1968); Bonds v. State, 220 Tenn. 555, 421 S.E.2d 87 (1967).

If the disparity is substantial, there would seem to be little reason for requiring the challenger to prove that the opportunity to discriminate exists before the government must explain the disparity, for proof concerning the workings of the selection system would be presented as part of the government's rebuttal case. Moreover, where there is a substantial disparity that the government cannot explain, the selection system should not be validated simply because the challenger could not obtain proof of the defect or "opportunity" that led to the disparity. In any event, proof of an opportunity to discriminate, as discussed in the later cases, means only proof that the selection system affords selection officials the opportunity, at some stage, to exercise discretion in the selection of jurors.

60. 97 S. Ct. 1272 (1977).

61. *Id.* at 1280.

62. *Id.* at 1276.

63. *Id.* at 1280 (citations omitted). Justice Powell, dissenting, joined by Chief Justice Burger and Justice Rehnquist, would have held that proof of intent, not just a significant disparity, is necessary to a prima facie case and would have applied the reasoning of Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977). *Id.* at 1287-92. See note 64 *infra*. Justice Burger, dissenting, joined by Justices Powell and Rehnquist, would have required the challenger to prove a significant disparity based on figures for the *eligible* population. 97 S. Ct. at 1285-86. This would have had the effect of undercutting virtually all challenges to jury selection systems, since eligibility can at present be based

Although *Partida* makes it clear that proof of a significant disparity establishes a prima facie case,[64] the decision is based on the discrimination principle. The Supreme Court has consistently analyzed the substantial disparity cases in terms of the "rule of exclusion,"[65] which amounts to an amalgam of the discrimination and representativeness principles. A "significant" or "substantial" disparity is viewed as creating an inference of "systematic," "intentional" or "purposeful" discrimination.[66] But the challenger need not prove actual discrimination, lack of good faith or actual prejudice,[67] and the inference of discrimination

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on such vague standards as "good character" and since eligible population figures are almost impossible to obtain. *See Juror Selection, supra* note 1, at 798-800.

64. It may be thought that recent decisions of the Supreme Court emphasizing the importance of intent as opposed to impact in discrimination cases tend to undercut these jury selection cases. In Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977), and Washington v. Davis, 426 U.S. 229 (1976), the Court, considering, respectively, zoning regulations and police hiring practices that had discriminatory impacts, emphasized the requirement of proof of a discriminatory intent or purpose. Unlike these cases, discrimination in jury selection involves not only the rights of people to serve as jurors but also the due process, equal protection and jury trial rights of litigants and the societal interest in representativeness. The Court has regarded the rights to serve on juries and to have cross-sectional juries as fundamental and compared them in importance to the right to vote. Taylor v. Louisiana, 419 U.S. 522 (1975); Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970). In Taylor v. Louisiana, 419 U.S. at 534, the Court said, "[t]he right to a proper jury cannot be overcome on merely rational grounds."

In *Arlington Heights*, the Court noted that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," citing, *inter alia*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) and Gomillion v. Lightfoot, 364 U.S. 339 (1960). A footnote to this statement notes that several jury selection cases fall into this category and says:

> Because of the nature of the jury selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*. See, e.g., Turner v. Fouche, 396 U.S. 346, 359 (1970); Sims v. Georgia, 389 U.S. 404, 407 (1967).

Id. at 5647 n.13. *See also* Washington v. Davis, 426 U.S. 229, 241. In *Partida*, the Court confirmed that jury selection cases are to be distinguished from the *Arlington Heights-Washington v. Davis* line of cases. 97 S. Ct. 1272, 1279.

65. *See, e.g.*, Castaneda v. Partida, 97 S. Ct. 1272 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970).

66. The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered in the selection process.

Castaneda v. Partida, 97 S. Ct. 1272, 1280 n.13.

67. Castaneda v. Partida, 97 S. Ct. 1272 (1977); Taylor v. Louisiana, 419 U.S. 522 (1975); Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Sims v. Georgia, 389 U.S. 404 (1967); Whitus v. Georgia, 385 U.S. 545 (1967); Cassell v. Texas, 339 U.S. 282 (1950); Smith v. Texas, 311 U.S. 128 (1940); Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972); United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); Black v. Curb, 422 F.2d 656 (5th Cir. 1970); Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969); Witcher v. Peyton, 405 F.2d 725 (4th Cir. 1969); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); Labat v. Bennett, 365 F.2d 698 (5th Cir.

is not defeated by proof of a nondiscriminatory intent or purpose, but only by proof that the underrepresented group is less eligible or available for jury duty.[68] Thus, a substantial underrepresentation is viewed as proof of intentional discrimination, but proof that the discrimination was unintentional or was based on administrative feasibility[69] or some other nondiscriminatory purpose does not defeat the inference of intentional discrimination or save the jury system. The analysis is described in terms appropriate to the discrimination principle, but reaches the same result, indirectly, that an analysis based on the representativeness principle would yield directly.[70]

Even if the results are the same, the use of discrimination terminology is undesirable because it obscures the true interests at stake, diverts attention to misleading issues such as intent, motive, and imputed malice, and provides a basis for validation of unrepresentative selection systems.[71] The choice of the appropriate theoretical basis for

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1966), *cert. denied*, 386 U.S. 991 (1967); King v. Cook, 298 F. Supp. 584 (N.D. Miss. 1969); Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1968); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).

68. Evidence that the underrepresented group is less eligible or available can be used to rebut a prima facie case, but a nondiscriminatory motive and denials of discrimination or intent to discriminate are insufficient. Taylor v. Louisiana, 419 U.S. 522 (1975); Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Norris v. Alabama, 294 U.S. 587 (1935). For a general discussion see *Juror Selection, supra* note 1, at 779-80.

Rebuttal evidence of lower eligibility is only relevant at a stage in the process before which eligibility criteria have been applied; this usually is not the case concerning source lists. *See* Castaneda v. Partida, 97 S. Ct. 1272, 1276 n.8.

69. *See* Taylor v. Louisiana, 419 U.S. 522 (1975); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971).

70. One possible difference is that the representativeness principle can mean that selection officials have a duty to find eligible people in an underrepresented cognizable class even though they are less eligible proportionally than people not in that class. Aside from the possibility that there may not be enough eligible people in the class to provide them representation in proportion to their numbers in the population, this would eliminate the basis and need for a rebuttal case and the sole question would be representativeness.

71. The *Partida* decision is a good example of the problems that arise from use of the discrimination theory. The Court held that the substantial disparity established a prima facie case, but because the holding was based on an inference of discrimination, the intent and motives of selection officials were brought into question. The government argued, based on the discrimination theory, that the facts that Mexican-Americans were a "governing majority" in the community and there were many Mexican-Americans in official positions created a presumption that there was no discrimination, which rebutted or negated the presumption created by the substantial disparity inference. The majority rejected this argument, stating that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of the group." 97 S. Ct. 1272, 1282. Justice Marshall, concurring, addressed this issue in detail, citing several studies on the matter, *id.* at 1283-85, and the four dis-

judicial decisions should be guided by an analysis of the underlying constitutional rights and societal interests. Though lack of access to governmental institutions by citizens in underrepresented groups has been analyzed in terms of discrimination in other contexts,[72] the fundamental rights of litigants and the societal interests in the legitimacy, integrity and impartiality of the judicial process are inextricably tied to the principle of representativeness, regardless of the intent, purpose, or actions of selection officials.[73] The representativeness approach, by placing an affirmative duty on selection officials to provide representative jury pools, focuses on the actual interests underlying the jury system and is therefore preferable from an analytical viewpoint.

The apparent hesitance of the courts to frame standards directly based on the representativeness principle while, at the same time, repeatedly recognizing representativeness as the underlying constitutional requirement, is due in large part to the lack of concrete standards for determining representativeness. Courts are understandably reluctant to embrace an explicit representativeness standard when there is no accepted measure of representativeness or any clear definition of a substantial disparity. Parts II and III demonstrate that these practical objections to the representativeness principle can be met.

II

Determining Representativeness and Inclusiveness

A. Standards of Representativeness

Whether derived directly from the representativeness principle or

senters discussed the question at length and adopted the government's position, *id.* at 1285-92. Although there would seem to be no basis for the "governing majority" presumption, and it explains, at most, why one might expect that Mexican-Americans would be fully represented, not why they were grossly underrepresented, surely this theoretical debate of assumptions about racial behavior should be extraneous to the fundamental constitutional question.

72. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Auth., 97 S. Ct. 555 (1977); Washington v. Davis, 426 U.S. 229 (1976); Dunn v. Blumstein, 405 U.S. 330 (1972). When such access involves a "fundamental right," an infringement is unconstitutional unless it is justified by a "compelling governmental interest" and there are no reasonable alternative methods for implementing the government's interest which do not infringe upon the right. *Id.*; Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); DeGregory v. Attorney Gen., 383 U.S. 825 (1966); NAACP v. Alabama, 377 U.S. 228 (1964); Shelton v. Tucker, 364 U.S. 479 (1960). The Court has held that both the rights of citizens to access or participation, Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970); and the rights of litigants to representativeness, Taylor v. Louisiana, 419 U.S. 522 (1975), are fundamental, but the Court has never explicitly analyzed the jury cases in terms of the compelling governmental interest standard. This analysis would also lead to the conclusion that a substantial disparity creates a prima facie case that cannot be rebutted by proof of a nondiscriminatory intent or purpose or administrative needs.

73. See text accompanying notes 41-49 *supra*.

from the rule of exclusion, the guiding concept of cross-sectionality[74] is, by its nature, mathematically based. Concrete, appropriate standards must therefore reflect mathematical as well as legal principles. This does not mean that mathematics will yield one correct standard or replace legal analysis; there are a variety of mathematical formulations, and each can and should be evaluated by legal as well as mathematical principles. Indeed, mathematics can only formulate and translate into quantitative terms the guiding principles and assumptions determined by legal principles and analysis.

Establishment of concrete standards of representativeness requires that two distinct questions be resolved. First, a measure of representativeness must be adopted. Then, using that measure, a maximum allowable deviation must be established.

Four methods of measurement have most frequently been proposed.[75] The equations for these standards and various mathematical relationships are presented in the footnotes.[76] For the purpose of discussion and evaluation, each standard will be applied to a hypothetical jurisdiction[77] in which the source is the voter registration list and 30% of the 18 and over population is black, 20% of the voter registration list is black, 70% of the 18 and over whites are registered to vote, and 41% of the 18 and over blacks are registered.[78]

1. *Absolute Disparity Standard.* This standard measures representativeness by the difference between the proportion of the popula-

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74. We have referred to this concept herein interchangeably as representativeness or cross-sectionality, although this analysis concerns the substantial disparity rules whether based on the representativeness or discrimination principle.

75. *See generally* JURY SELECTION PROCEDURES, *supra* note 4, at 95-98; Foster Appendix, *supra* note 1; *Juror Selection, supra* note 1, at 785-97; *Implementation in the Fifth Circuit, supra* note 27; WORKS, *supra* note 27; Finkelstein, *The Application of Statistical Decision Theory to Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

76. The following notation has been used in presenting the relevant equations:

R_1, R_2, etc. are used for the various standards of representativeness,

P = proportion of the population in the underrepresented category,

L = proportion of the source or pool in the underrepresented category,

A = proportion of the people in the overrepresented category on the source or pool, and

C = proportion of the people in the underrepresented category on the source or pool.

77. The data used in this hypothetical is fairly typical of some large urban areas. The four variables are interrelated as follows:

$$\frac{A}{C} = \frac{P\,(1 - L)}{L\,(1 - P)}.$$

Once three of these variables are specified, the fourth is mathematically determined. Thus, in the hypothetical, once it is specified that P = .3, L = .2, and A = .7, C must be .41.

78. The focus of this article is source lists, but the discussion and evaluation of these standards applies as well to jury pools.

tion and the source or pool that is in the underrepresented category.[79] Thus, in the hypothetical, the absolute disparity for blacks is 30% minus 20%, or 10%. The absolute disparity standard has been formally suggested with a maximum allowable disparity of 10-15%;[80] it has been used, without discussion or any specific maximum, by most courts.[81]

2. *Comparative Disparity Standard.* An elementary mathematical statement of the cross-sectional legal principle is that in a fair, cross-sectional system, the probability of any eligible person being included in the source (or in the final pool) would be the same for every eligible person, regardless of race, ethnic background, sex, age, or socio-economic status.[82] The comparative disparity standard measures representativeness by the percentage by which the probability of serving is reduced for people in a particular category or cognizable class. This percentage is determined by the following calculation:

$$\frac{\text{Proportion of the population that is in the specified category} - \text{Proportion of the source that is in the specified category}}{\text{Proportion of the population that is in the specified category}} \times 100.[83]$$

The comparative disparity is the same as the absolute disparity divided by the proportion of the population that is in the specified category. In the hypothetical, the comparative disparity is

$$\frac{30\% - 20\%}{30\%} \times 100 = 33\%.$$

79. The absolute disparity, R_1, is defined as

$$R_1 = P - L.$$

80. Henry D. Moore, Professor of Economics and Director of the Center for Business and Economics Research, University of Alabama, has made the suggestion of 10%. WORKS, *supra* note 27, at 108.

81. *See, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970); Swain v. Alabama, 380 U.S. 202 (1965); Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972); Black v. Curb, 464 F.2d 165 (5th Cir. 1972); Sanford v. Hutto, 394 F. Supp. 1278 (E.D. Ark.), *aff'd.*, 523 F.2d 1383 (8th Cir. 1975). An absolute disparity of 10% was referred to in *Swain* as a minimal showing to support a challenge, 380 U.S. at 208-09. Later decisions of the Court do not apply or mention this requirement. See note 181 *infra*.

82. This probability would be

$$\frac{1}{\text{(eligible population)}}.$$

83. The comparative disparity, R_2, is defined as

$$R_2 = \frac{P - L}{P}.$$

This means that an eligible black person has 33%, or one-third, less chance of being included than the average person.[84]

The comparative disparity or reduced probability of serving standard has been used, without a specified maximum, by several courts.[85] The courts using this measure of representativeness have not discussed their basis for adopting it and appear to have done so intuitively.

3. *Proportion of Eligibles Standard.* The proportion of eligibles standard is calculated as follows:

$$\frac{\text{Proportion of eligibles in the overrepresented category included} \quad \text{Proportion of eligibles in the underrepresented category included}}{\text{Proportion of eligibles in the overrepresented category included}} \times 100.[86]$$

In the hypothetical, this is

$$\frac{70\% - 41\%}{70\%} \times 100 = 41.3\%.$$

This standard has been used by one court,[87] and the U.S. Civil Rights Commission has recommended its use with an allowable maximum of 20%.[88]

The comparative disparity and proportion of eligibles standards are directly related.[89] Because several courts have used the compara-

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84. The relationship between the comparative disparity for a group (R_2) and the total proportion of the group not included (D) is

$$(1 - D) = \frac{M}{N}(1 - R_2),$$

where M is the number of people in the source or pool, N is the number of people in the population, and $\frac{M}{N}$ is what we have defined as the inclusiveness of the source or pool.

85. *E.g.*, Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972) (referring to both the absolute and comparative disparities without comment); United States v. Goff, 509 F.2d 825 (5th Cir. 1975), *cert. denied*, 423 U.S. 857 (1975); Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971); Quadra v. Superior Court, 403 F. Supp. 486 (N.D. Cal. 1975); Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. 1974).

86. The proportion of eligibles, R_3, is defined as

$$R_3 = \frac{A - C}{A} = \frac{P - L}{P(1 - L)}.$$

87. United States v. McDaniels, 370 F. Supp. 298 (E.D. La. 1973), *aff'd*, 509 F.2d 825, *cert. denied*, 423 U.S. 857 (1975).

88. Staff Memorandum, Office of General Counsel, U.S. Commission on Civil Rights, *Assuring a Fair Racial Cross Section in the Selection of Jurors Under the Jury Selection and Service Act of 1968* (1969), at 3, cited in WORKS, *supra* note 27, at 105 n. 12.

89. The proportion of eligibles standard is equal to the comparative disparity divided by the proportion of the source that is in the overrepresented category, or

tive disparity standard and found it intutitively understandable and applicable, and because the comparative disparity is a direct measure of the reduced probability of serving, the proportion of eligibles standard is not further considered in this analysis.

4. *Statistical Significance Test.* The statistical significance test measures representativeness by calculating the probability of the disparity occurring by chance in a random drawing from the population.[90] If that probability is very low, the conclusion is drawn that the disparity is not the result of chance but results from bias or discrimination. The cutoff probability used in most industrial and scientific applications is 5%.[91]

The statistical significance test depends on the number of people in the sample drawn from the source or pool as well as its proportional makeup, and it has been criticized in the scientific literature on this ground.[92] In the hypothetical, with a sample size of 500, the probability or odds of obtaining a sample of 500 that is 20% black by picking randomly from a population that is 30% black is less than 1 out of 1,000,000.[93] Since a probability of less than 1 out of 1,000,000 is less than 5% (or 1 out of 20), the conclusion is drawn that the selection system discriminates against blacks.

$$R_3 = \frac{R_2}{(1 - L)}.$$

If the overrepresented group is a very large proportion of the source on pool, the two standards are almost equal. However, if the overrepresented group is one-half of the source or pool, the proportion of eligibles would be double the comparative disparity.

90. The statistical significance test probability, R_4, is determined from a normal distribution table from z, where

$$z = \frac{(P - L)\sqrt{n}}{\sqrt{P(1 - P)}}.$$

n is the size of the sample from the source or pool.

91. M. DEGROOT, PROBABILITY AND STATISTICS 380 (1975).

92. *See, e.g.*, D. MORRISON & R. HENKEL, THE SIGNIFICANCE TEST CONTROVERSY: A READER (1970); H. RAIFFA & R. SCHLAIFER, APPLIED STATISTICAL DECISION THEORY vii (1961) ("In most statistical practice, consequences and performance characteristics receive mere lip service while decisions are actually made by treating the numbers .05 and .95 with the same superstitious awe that is usually reserved for the number 13."); M. DEGROOT, PROBABILITY AND STATISTICS 380-81 (1975); Kadane, Book Review, 68 J. AM. STATISTICAL ASSOC. 1025 (1973).

93.

$$z = \frac{[.3 - .2]\sqrt{500}}{\sqrt{.3(1 - .3)}} = 4.88$$

Using NATIONAL BUREAU OF STANDARDS, THE TABLES OF PROBABILITY FUNCTIONS, APPLIED MATHEMATICS SERIES, NO. 23 (1953), this translates into a probability of 5.5×10^{-7}, or less than one in a million.

The statistical significance test has been adopted by the courts in employment discrimination cases[94] and has been suggested as a standard for representativeness of jury sources and pools.[95] Although no court has adopted it in the jury selection context, the Supreme Court has referred to the probability of obtaining disparities by chance.[96]

B. Selecting a Standard of Representativeness

Careful analysis of the proposed standards from both a mathematical and a legal standpoint shows that the comparative disparity method is clearly superior to the others.

The absolute disparity standard is objectionable on both legal and mathematical grounds, because it fails to account for the range at which the disparity occurs.[97] For example, an absolute disparity of 10% in a jurisdiction that is 30% black is quite different from the same absolute disparity in a jurisdiction that is 11% black. In the jurisdiction that is 30% black, a 10% absolute disparity means that the eligible black person has 33% less chance of serving than the average eligible person, while in the jurisdiction that is 11% black, the same absolute disparity means that the eligible black person has 91% less chance of serving. This difference is, of course, legally significant as well: in the 11% black jurisdiction, the 10% absolute disparity amounts to almost total exclusion of black people.[98] The absolute disparity standard

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94. *E.g.*, Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973); Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd.*, 458 F.2d 1167 (2d Cir. 1972).

95. Finkelstein, *The Application of Statistical Decision Theory to Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966); *Juror Selection, supra* note 1, at 785-97; Report of B.R. Stauber to the Federal Judicial Center (1973), discussed in Foster Appendix, *supra* note 1, at 818.

96. Castaneda v. Partida, 97 S. Ct. 1272, 1281 n.17 (1977); Alexander v. Louisiana, 405 U.S. 625, 630 n.9 (1972); Whitus v. Georgia, 385 U.S. 545, 552 n.2 (1967). Every court that has been presented with evidence concerning this test has admitted and considered the evidence. *E.g.*, State v. Little, No. 74 Cr. 4167 (Super. Ct. of Beauford County, N.C. 1975); People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974); United States v. Saxe, Crim. No. 75-236 U.S.D.C. (E.D. Pa. 1976); United States v. Briggs, 366 F. Supp. 1365 (N.D. Fla. 1973).

97. *See Juror Selection, supra* note 1, at 786.

98. One court has noted this deficiency of the absolute disparity standard:

> [The comparative disparity] is useful because the importance of a difference of a given amount, for example, 10%, varies depending upon the magnitude of the group's representation in the population. [An absolute] disparity of 10% constitutes a far more significant underrepresentation when the group comprises 12% of the population but only 2% of the grand jury (—83% [comparative disparity]) than when the group comprises 60% of the population but only 50% of the grand jury (—20% [comparative disparity]) [*sic*; this should be —17%].

Quadra v. Superior Court, 403 F. Supp. 486, 495 n.9 (N.D. Cal. 1975).

yields the same result in situations in which the results clearly should differ.[99]

The statistical significance test, while it accounts for the range of the disparity, involves complicated calculations resulting in answers that are difficult to visualize and to evaluate.[100] Moreover, since the calculated probability is greatly reduced by increasing the size of the sample from the source or pool, the result is significantly affected by the choice of sample size.[101] Even with moderate sample sizes, small disparities result in very low probabilities.[102]

The comparative disparity standard is not subject to the difficulties of the other two standards. Because it measures the reduced probabil-

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99. With the suggested 10% absolute disparity standard, an 11% black population and a source or pool that is 1% black would not be impermissible.

100. See cases cited note 96 *supra*. For example, the three probabilities referred to by the Supreme Court were 1 out of 10^{140} in *Partida*, 1 out of 20,000 in *Alexander*, and .000006 (6 out of 1,000,000) in *Whitus*. It is clear that all of these probabilities are quite small, and that provides useful information, but evaluation and differentiation between them is difficult. The choice of a cutoff point in terms of this probability would be difficult to evaluate or visualize.

101. The statistical significance test calculates the probability of randomly drawing a sample of size n that is x% (or less) black from a source or pool that is y% black, not the probability of obtaining the disparity. Thus, in the hypothetical, it calculates the probability of randomly drawing n people, 20% of whom are black, from a source or pool that is 30% black (if that probability is very low, the hypothesis that the source or pool is 30% black is rejected). As n is increased, it is less likely that a random drawing would yield only 20% blacks. For example, if $n = 50$, the probability is about 6 out of 100; if $n = 500$, the probability is about 1 out of 1,000,000; and if $n = 5{,}000$, the probability is about 8 out of 10^{54}. If all of the source or pool is sampled, the probability of obtaining 20% blacks (or any percentage other than 30%) is zero. In this sense, the significance test tells us that there is a disparity without really providing any information concerning how big or substantial the disparity is and suffers from the contradiction that its results can be less revealing the more information (from a larger sample) we have.

The problem of sample size is not as acute in employment discrimination cases. There, tests of significance have been used to assess whether a group of individuals, such as those hired by a particular company, represent a random sample of people qualified for employment. If the probability of obtaining the composition actually hired by the company is very low, the conclusion is drawn that the company discriminated. See authorities cited note 94 *supra*. The dependence of this method on the sample size is less important because the sample size is the number of people hired and is typically small. This use of significance tests is inappropriate for assessing jury sources or pools. The source is not the result of a drawing from the population but a list or combination of lists compiled for other purposes and by other means, and the pool is the result of a drawing from the source. Moreover, if the composition of the source or pool is known exactly, as it must be for this type of significance test, the relevant question is whether the source or pool provides an adequate cross section of the community, not whether it is a random sample of the community. A standard of cross-sectionality, like the comparative disparity, is needed to address and resolve this question appropriately.

102. For example, the probability of randomly drawing a sample of 2,000 that is 28% black from a source or pool that is 30% black is .026 (about half of the commonly used 5% cutoff).

ity of serving for prospective jurors in a particular category, its results are not affected by the size of the sample or the proportion of the population in the specified category. Moreover, the comparative disparity standard can be easily calculated, readily understood, and consistently interpreted.[103]

Judge Walter P. Gewin of the Fifth Circuit Court of Appeals, who has written extensively on this matter,[104] recognizes the deficiencies of the absolute disparity standard, the problems involved with use of statistical significance tests, and the advisability of the comparative disparity standard.[105] He does not, however, believe that the comparative

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103. In using the comparative disparity standard, although the sample size does not affect the result, care should be taken that the sample size is large enough so the comparative disparity is reliably determined. The sample size necessary to insure any given degree of accuracy can be calculated. This is done by first stipulating an error, e, and a probability of that error occurring, p. Then, assuming the comparative disparity, R_2 has a normal distribution (an assumption supported in statistical theory by the central limit theorem), the sample size, n, necessary to have a probability of $(1 - p)$ that R_2 is between $R_2 + e$ and $R_2 - e$, is calculated as follows:

$$n \geqq \frac{\left[\frac{z}{e}\right]^2 \left[\frac{L(1-L)}{P^2}\right]}{1 + \frac{\left[\frac{z}{e}\right]^2 \left[\frac{L(1-L)}{P^2}\right]}{M}}.$$

where,

L = proportion of the source or pool with the specified characteristic,
P = proportion of the population with the specified characteristic,
M = size of the source or pool, and
z = a constant calculated from the normal distribution and dependent on p (specifically, it is the $(1 - p/2) \times 100$ percentile of the standard normal distribution).

Since L is not known before the sample is taken, it must be estimated based on an initial sample. An initial sample of about 100 will provide a sufficiently accurate estimate of L. The following table presents some sample calculations of n for an example where $\frac{L(1-L)}{P^2} = 1$ and $p = .10$:

	M (size of source or pool)		
e (error)	5,000	100,000	∞
±.01	4,220	21,297	27,060
±.015	3,532	10,736	12,027
±.02	2,875	6,337	6,765
±.05	890	1,071	1,082

This means, for example, that with a source or pool of 100,000 and a sample of 21,297 that results in $R_2 = 15\%$, we are 90% sure that R_2 is between 14% and 16%.

104. *See* Foster Appendix, *supra* note 1; WORKS, *supra* note 27; *Implementation in the Fifth Circuit*, *supra* note 27.

105. *See* Foster Appendix, *supra* note 1, at 818-19, 834-45; WORKS, *supra* note 27,

disparity standard should be applied where the cognizable class is a very small percentage of the population.[106] For example, where blacks are 4% of the population and 2% of the source or pool, the comparative disparity is 50%. This is a large comparative disparity, although the resulting number of blacks who will not appear on jury panels because of this disparity is small. On a panel of 50 jurors, there should be 4%, or 2, blacks, but because of the disparity, there is 2%, or 1, black. Since the disparity results in a difference of only one black person out of 50 on the panel, this argument goes, it is insignificant and harmless.[107] Judge Gewin would apply the comparative disparity standard except when the cognizable class is a very small percentage of the population, in which case the absolute disparity standard would be applied.[108]

This suggestion would have the effect of applying the absolute disparity standard in the range where it is least revealing or appropriate. Moreover, application of the absolute disparity standard where the cognizable class is small means that almost all underrepresentations of small and medium-sized minorities—even total exclusions—are validated,[109] for by definition, a small minority can never have a large absolute disparity. If the maximum allowable absolute disparity is 10%, total exclusion of a 9% minority is permissible.[110] Even if the Constitution will tolerate discrimination against or underrepresentation of small or medium-sized minorities as opposed to large minorities,[111] the absolute disparity standard is inappropriate. A preferable test would be to apply a larger maximum comparative disparity to the small minority.[112]

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at 107-9. *See also* JURY SELECTION PROCEDURES, *supra* note 4, at 92-98 (referring to the comparative disparity as the "rate of error"; "the comparative method is more revealing of the success of a selection scheme in achieving—or failing to achieve—the goal of producing a representative jury").

106. Foster Appendix, *supra* note 1, at 834-45.

107. Even only one minority person on the panel can hardly be considered insignificant, in practical as well as constitutional terms, particularly where one of the litigants is also in that minority. See note 133 *infra*.

108. Foster Appendix, *supra* note 1, at 835. Judge Gewin does not suggest where the line between large and small cognizable classes should be drawn.

109. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 96-98.

110. Use of the absolute disparity standard for small minorities means that total exclusion of any minority that is smaller than the maximum allowable absolute disparity would be permissible.

111. See text accompanying notes 132-35 *infra*.

112. A 15% maximum comparative disparity has been advocated here. If the harmless error reasoning is adopted as to small minorities, a 25% maximum comparative disparity could be applied to cognizable classes that are less than 10% of the population. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 98.

A continuous but not as easily comprehensible measure of representativeness that

The comparative disparity standard is a clear, easily understood and used, and conceptually valid measure of representativeness. Its adoption would fill a long standing vacuum and provide the courts with a workable standard for determining representativeness. Adoption of a standard for determining representativeness will not, however, alone insure the rights of litigants or define the duties of selection officials. A maximum allowable underrepresentation, a numerical cutoff beyond which a jury system loses its presumption of validity, must be established. Otherwise, inconsistent application of the comparative disparity standard could further erode the fundamental constitutional (and statutory) principle of representativeness.

The occasions on which establishment of workable standards for safeguarding constitutional rights requires the adoption of a precise numerical cutoff point are not frequent. Yet the Court has established precise numerical standards when defining constitutional rights concerning jury trials,[113] voting requirements[114] and privacy.[115] In each

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gives any given comparative disparity less significance the smaller the underrepresented group's proportion of the population is

$$R_5 = \frac{L(1 - P)}{P(1 - L)}.$$

R_5 is the ratio of the odds of drawing a person in the underrepresented group from the source or pool, $\frac{L}{(1 - L)}$, to the odds of drawing a person in the underrepresented group from the population, $\frac{P}{(1 - P)}$. Also, $R_5 = A/C$.

113. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court ruled that there is a right to a jury trial where the accused is charged with a "serious" as opposed to a "petty" offense. The accused in *Duncan* was charged with assault, which had a two-year maximum sentence. The Court ruled that this was a "serious" offense, but no further guidance was provided as to the line between "serious" and "petty." In Baldwin v. New York, 399 U.S. 66 (1970), the Court adopted the length of the maximum authorized penalty as the controlling criterion in drawing a line between petty and serious for purposes of the sixth amendment, setting six months as the maximum allowable penalty for nonjury trials. In drawing this precise line, the Court examined the practice in the various states, analyzed, as precisely as possible, the constitutional right and state interest involved, and adopted a numerical cutoff. *See also* Bloom v. Illinois, 391 U.S. 194 (1968) (an accused charged with criminal contempt has a right to a jury trial if the sentence imposed is greater than six months); Codispoti v. Pennsylvania, 418 U.S. 506 (1974) (consecutive sentences totalling more than six months for multiple criminal contempts arising from one trial require a right to a jury trial).

114. Residency requirements for voting pose a conflict between the citizen's constitutional right to vote and the state's interest in preparing and maintaining appropriate records to protect against fraud. The Court established a maximum allowable residency requirement of 50 days. Burns v. Forsten, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972).

115. In the abortion cases, Roe v. Wade, 410 U.S. 113 (1973), the Court found a conflict between a woman's right to privacy concerning the abortion decision and the state's interest in protecting the health of pregnant women. The Court analyzed these

instance, the Court has analyzed the conflicting rights and interests involved and used available expertise to draw as accurate a line as possible. The right to a representative jury embodies a cross-sectional principle that is itself mathematically based, making it impossible to protect that right or define its limits without establishing a maximum allowable underrepresentation.

Determining how large an underrepresentation should be allowed before a prima facie case of invalidity is established involves determining a level at which the government is required to justify the disparity in representation of a cognizable group.[116] For example, if the selected figure were 15%, the government would have to justify the comparative disparity of 33% in the hypothetical. If the selected figure were 35%, no justification need be made.

There is, of course, no legitimate governmental interest in unrepresentativeness, but the ease and costs of increasing representativeness should be considered[117] in setting a standard[118] The representativeness of sources can be increased by the use of multiple lists, which is the method already provided for in the Federal Act[119] and the Uniform Act.[120] Easy and inexpensive methods for use of multiple lists are presented in this article;[121] they are presently used in several jurisdictions.[122] These methods can provide, at small cost, sources that are within a 5% comparative disparity concerning every cognizable class.

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rights and interests, examined the available medical evidence, and concluded that a woman has a right to an abortion during the first trimester of pregnancy.

116. Under the rule of exclusion, the basis for rebuttal is a showing that the underrepresented group is less eligible or available. The representativeness principle may mean that there is no basis for rebuttal. See notes 68 & 70 *supra*.

117. In Taylor v. Louisiana, the Court said,

> . . . the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.

419 U.S. 522, 535 (1975).

118. The ease and expense involved were seen as important considerations by the framers of the Federal Act. Foster Appendix, *supra* note 1, at 816; *Implementation in the Fifth Circuit*, *supra* note 27, at 383. Judge Gewin, who was a member of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, has said:

> [S]ubstantiality with regard to relatively small disparities had to be defined in terms of the practicalities of the circumstances. Thus a disparity which could be eliminated easily and effectively would tend to appear more substantial; and, conversely, a disparity which would be difficult to eliminate would tend to appear less substantial. This working definition of substantiality would, of course, have to be applied so as to place any error on the side of safety.

Id. (footnotes omitted).

119. 28 U.S.C. § 1863(b)(2) (1968).

120. UNIFORM ACT, *supra* note 9, § 5.

121. See text accompanying notes 218-49 *infra*.

122. See Table E *infra*.

The available nationwide data indicates that most systems are within a 10-15% comparative disparity concerning all or most cognizable classes without using multiple lists.[123]

Since the available methodology for increasing representativeness is widely used and not prohibitively expensive, there seems to be no legitimate reason to allow more than a 15% comparative disparity for any cognizable class before the government must at least justify the disparity.[124]

C. *The "Substantial Impact" Test: A Source of Judicial Confusion*

Recently, a new rule, the "substantial impact" test, has been adopted by the Tenth Circuit in *United States v. Test*,[125] the Second Circuit in *United States v. Jenkins*,[126] and the Fifth Circuit in *United States v. Goff*.[127] In *Jenkins*, blacks were approximately 5.5% of the voting age population and 3.3% of the voter registration list.[128] The court referred to both the absolute disparity, 2.2%, and the comparative disparity, 40%, which the court noted was "substantial indeed."[129] Nevertheless, the court held that this disparity was insubstantial in terms of the number of blacks it eliminated from a panel of 60 jurors. Thus, if there were 5.5% blacks instead of 3.3%, a panel of 60 jurors would have 2.2% of 60, or 1.32, additional black jurors. The court then held that "a difference of one (1) Negro in a panel of 60 jurors is not substantial," and ruled, on this basis, that a prima facie case had

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123. See Table C *infra*. For example, the nationwide data indicates that there was a comparative disparity concerning black people of 11.7% in 1974 and 9.4% in 1972.

124. The Civil Rights Commission has suggested a 20% maximum in terms of the proportion of eligibles standard. WORKS, *supra* note 24, at 105 n.12. This is directly related to the comparative disparity standard, and the values are close where the proportion of the source or pool in the overrepresented group is large. See note 89 *supra*. In JURY SELECTION PROCEDURES, *supra* note 4, at 98, a maximum allowable comparative disparity of 20% is recommended based on the Civil Rights Commission suggestion (without noting the difference between the comparative disparity and proportion of eligibles standards).

"The essential if not wholly satisfactory [task] of determining the line," Baldwin v. New York, 399 U.S. 66, 68 (1970), involves a value judgment and a balancing of interests that cannot be accomplished by mathematics. We have placed a high value on representativeness while allowing leeway for administrative feasibility. Selection systems within a 15% comparative disparity as to all cognizable classes are not difficult or expensive to accomplish.

125. 550 F.2d 577 (10th Cir. 1976).

126. 496 F.2d 57 (2d Cir. 1974).

127. 509 F.2d 825 (5th Cir. 1975).

128. 496 F.2d 57, 64 (2d Cir. 1974).

129. *Id.* at 64-65. The court did not calculate the comparative disparity, 40%, but referred to a "ratio of roughly 5 to 3," which is another way of saying the same thing.

not been established.[130] The same calculations were made in *Goff* (concerning a minority that constituted over a quarter of the population) and *Test*, with similar results and the same conclusion. The data concerning all three cases are presented in Table A.

Table A

Disparities in *Jenkins*, *Test* and *Goff* Cases

Case and group underrepresented	Proportion of Population (%)	Proportion of voter registration list (source) (%)	Absolute disparity (%)	"Impact"	Comparative disparity of source (%)
Jenkins (blacks)	5.5	3.3	2.2	1 (of 60)	40.0
Test (Chicanos)	10.4	6.9	3.5	2 (of 50)	33.7
Goff (blacks)	26.3	21.0	5.3	1 (of 23)	20.2

Although the "substantial impact" rule purports to shed some light beyond the substantiality of the absolute and comparative disparities, it is in fact just another way of expressing the absolute disparity. The "impact" is just the absolute disparity times the size of the panel. Thus, if a panel has 60 jurors, an absolute disparity of 10% is the same as an "impact" of 6, an absolute disparity of 2.2% is the same as an "impact" of 1.32, and so on. And since it adds another variable, the size of the panel, it confuses rather than enlightens. For example, the *Jenkins* court found insubstantial an "impact" of one juror on a panel of 60 and the *Goff* court found insubstantial an "impact" of one juror on a grand jury of 23. The smaller the panel, the smaller the "impact" of a given absolute disparity.[131] The "substantial impact" rule adds nothing to the absolute disparity standard and is subject to the same mathematical and legal criticisms.[132] It further confuses an already confused area of the law by introducing another variable, the panel size.

The absolute disparity standard and the substantial impact rule also raise serious constitutional questions. The unavoidable effect of both is to validate discrimination against small and medium-sized minorities. The use of voter registration lists resulted in a reduced probability of serving of 33% for eligible Chicanos in *Test*, 40% for eligible blacks in *Jenkins*, and 20% for eligible blacks in *Goff*—and

130. *Id.* at 66.

131. The maximum "impact" for any underrepresented group is the group's proportion of the population times the panel size.

132. See text accompanying notes 97-99 *supra*.

yet all three courts failed to require the government to explain or justify these serious underrepresentations. None of these opinions refers to any authority for the proposition that the Constitution only prohibits underrepresentation of or discrimination against large as opposed to small or medium-sized minorities, or that the exclusion of only one minority juror is insignificant.[133]

On the contrary, discrimination against and underrepresentation of all cognizable classes—which surely include blacks and Chicanos, no matter what proportion of the population they may be—have always been the constitutional focus of the jury selection cases.[134] If any special rule is to be formulated for small minorities, our history and our constitutional tradition would seem to require that discrimination against them calls for a "more searching judicial inquiry,"[135] not a less stringent standard.

D. Standards of Inclusiveness

A source list can be fully representative of all cognizable classes but comprise only a small portion of the eligible population in a community.[136] For example, in a county of 1,000 eligible people of whom 25% are black, a source list of 100 people, 25 of whom are black, would be fully representative of blacks but only 10% inclusive, thereby excluding 90% of the eligible population. The principles underlying the jury selection cases require that source lists[137] be sufficiently inclu-

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133. Even only one minority person on the panel can hardly be considered insignificant, in practical as well as constitutional terms, particularly if one of the litigants is a member of a minority or if racial or ethnic issues are involved in the case. The presence of one minority person can affect the tenor of a case and counsel's approach to the issues. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 33; Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970). Although one person can be removed with a peremptory challenge, that in itself can affect the other jurors, and the number of peremptory challenges is small and the use of each one significant. In this regard, the Supreme Court has recently ruled that the exclusion of "merely one" juror in violation of Witherspoon v. Illinois, 391 U.S. 510 (1969) ("death-qualified" jury unconstitutional) requires a new trial. Davis v. Georgia, 97 S. Ct. 399 (1976).

134. *E.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 475 (1954); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

135. Justice Stone, in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), said:

> Discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

136. The converse is not true; a source that is fully inclusive is, by definition, fully representative.

137. Unlike the standards of representativeness, see text accompanying notes 74-96 *supra*, the inclusiveness requirement and the standards of inclusiveness discussed here are applicable only to the source and not to the pool.

sive that a significant proportion of the eligible population is not excluded, although the courts have not explicitly recognized an inclusiveness requirement.[138]

A substantially underinclusive source, though sufficiently representative as to every cognizable class, can be in contradiction to the rights of citizens and litigants and to the societal interests in the legitimacy, integrity and impartiality of the judicial process. For example, the list of real property owners in a jurisdiction may be sufficiently representative but include less than half of the eligible people. The use of such a source list compromises the societal interest in broad based citizen participation.[139] Moreover, the people on such a source list may well have considerably different values, attitudes and experience from the rest of the eligible population, which would affect the rights of litigants and undermine the impartiality, legitimacy and integrity of the judicial process.[140] One court has suggested that a source list that contains only half of the eligible people in a community may be unconstitutional.[141]

If some degree of inclusiveness is deemed to be constitutionally required, the courts will have to establish standards. Experience with multiple list systems has shown that use of one or two well chosen supplemental lists can double the number of names on voter registration lists.[142] In the context of easy and inexpensive methods for obtaining 95% inclusiveness,[143] perhaps 80% should be required.[144]

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138. *But see* Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Simmons v. Jones, 317 F. Supp. 397 (S.D. Ga. 1970); United States v. Hunt, 265 F. Supp. 178 (W.D. Tex. 1967).

139. See text accompanying notes 41-49 *supra*.

140. In Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) the Court said:

> [T]he broad representative character of the jury should be maintained, partly as assurance of diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility,

quoted in Taylor v. Louisiana, 419 U.S. 522, 530 (1974). In White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966), the court said:

> Jury service on the part of the citizens of the United States is considered under our law in this country as one of the basic rights and obligations of citizenship [and] a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens . . . .

See also UNIFORM ACT, *supra* note 9 and text accompanying notes 210-17 *infra*, which suggests the need for inclusiveness as well as representativeness, and Modified Plan for the United States District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors (March 16, 1976), at 3, which recognizes the need to make a "greater number of citizens . . . eligible."

141. United States v. Hunt, 265 F. Supp. 178 (W.D. Tex. 1967).

142. See text accompanying notes 236-49 *infra*; *see* JURY SELECTION PROCEDURES, *supra* note 4, at 103-4. After Colorado adopted the Uniform Act, *supra* note 9, which makes use of multiple lists mandatory, "most Colorado counties had almost twice as many names for potential jurors as they had from the voters' list alone." *Id.* at 103. In North Dakota, which also adopted the Uniform Act, use of the lists of licensed drivers with actual voters' lists increased the sources by from 80% to 100%. *Id.* at 104.

143. See text accompanying notes 217-49 *infra*.

144. An additional standard, analogous to the representativeness standard based on

III

Application of Constitutional and Statutory Principles To Source Lists

A. Representativeness and Inclusiveness of Voter Registration And Other Single Source Lists

Analysis of the evidence presented in recent challenges to jury systems reveals that most of the proven unrepresentativeness is attributable to the unrepresentativeness of the source list.[145]

Table B summarizes the statistical evidence presented in four typical challenges.[146] For each court and category listed, the first three columns present the specified category's percentage of the population, source list and final pool, respectively. The fourth column presents the comparative disparity of the final pool, and the fifth column presents the percentage of the comparative disparity of the final pool that is attributable to the source. For example, in the challenge to the jury system in the United States District Court for the Northern District of Florida, evidence indicated that 22.8% of the population was black while 16.0% of the final pool was black. Since the source was only 16.3% black, 95.6% of the total resulting comparative disparity was attributable to the source and only 4.4% to the process.[147]

Except for the underrepresentation of women in the challenge to the jury system in the Supreme Court of New York, Erie County, which officials admitted resulted from intentional discrimination against women in choosing names from the source, all or most of the unrepresentativeness proved in these cases was attributable to the unrepresentativeness of the sources utilized.

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the systematic exclusion principle, discussed *infra*, could provide that a prima facie case of underinclusiveness is established by proof that a significantly more inclusive (perhaps 10%) list or combination of lists is available with reasonable costs and effort.

145. See note 4 *supra*.

146. One of the authors, David Kairys, has been counsel in several challenges, including the second and fourth challenges listed in Table B and the Philadelphia state court challnge discussed in *Juror Selection*, *supra* note 1, at 789-801, and works with the National Jury Project, which collects data concerning jury challenges. The examples presented in Table B are typical of challenges over the last several years. *See also* Jury Selection Procedures, *supra* note 4, at 85-106 and Appendices.

147. This was calculated as follows: The disparity between the proportion of the pool and population that is black is 22.8 minus 16.0, or 6.8. The disparity attributable to the source is 22.8 minus 16.3, or 6.5, which is 95.6% of the total disparity. The result is the same whether the absolute or comparative disparities are used.

Table B

Proportion of Unrepresentativeness of Various Jury Systems that is Attributable to Source Lists[148]

Court and Category Under-represented	% of Population	% of Source	% of Final Pool	Comparative Disparity of Final Pool (%)	% of Comparative Disparity of Final Pool Attributable to Source
1. Superior Court of Beauford County, North Carolina					
Race					
Blacks	30.2	18.9	17.0	−43.7	85.6
2. U.S. District Court for the Eastern District of Pennsylvania					
Age					
Under 30	25.5	17.2	18.6	−27.1	100.0
Under 40	41.8	32.2	33.3	−20.3	100.0
Race					
Nonwhites	15.7	11.7	12.8	−18.5	100.0
3. U.S. District Court for the Northern District of Florida					
Race					
Blacks	22.8	16.3	16.0	−29.8	95.6
4. Supreme Court of New York, Erie County					
Race					
Blacks	8.4	6.5	5.1	−39.3	57.6
Age					
21 to 29	20.7	4.5	3.4	−83.6	93.6
Sex					
Women	53.0	53.0	16.7	−70.4	0.0

148. The data presented in the first three columns of Table B was submitted to the courts listed in challenges to the jury selection systems in the following cases:

1) State v. Little, No. 74 Cr. 4176, (Super. Ct. of Beauford County, N.C. 1975). The source was voter registration and tax lists (with no rules or established procedures for using the two lists together; see text accompanying notes 218-49 *infra*). The figure presented for the proportion of the source that is black, 18.9%, was for the voter registration list alone; the figure for the tax list was not known, but testimony established that it was lower than the corresponding figure for the voter registration list. The proportion of underrepresentation of blacks attributable to the source was therefore actually greater than the table indicates. Venue was changed before the challenge was resolved. *See generally* Michael, Mullin, O'Reilly & Rowan, *Challenges to Jury Composition in North Carolina*, 7 N. CAROLINA CENT. L.J. 1 (1976).

2) United States v. Saxe, Crim. No. 75-236 (E.D. Pa. 1976). The source was voter registration lists. The figures indicate that the process served to make the system more representative. The defendant pled guilty before a decision on the jury challenge was rendered.

3) United States v. Briggs, 366 F. Supp. 1365 (N.D. Fla. 1973). The source was

The overwhelming majority of jury systems throughout the country use voter registration lists as the source,[149] although all available studies and data indicate that voter registration lists do not represent a cross section of our communities and are substantially underinclusive.[150] The Census Bureau does a thorough study of voting and registration after each election. Since 1960, these studies have reached the same conclusions concerning the representativeness and inclusiveness of voter registration lists. The study of the 1972 election stated:

> [H]igher levels of registration and voting were associated with persons who were male, white, those in the middle age group (35-64), those persons with at least a high school diploma, those in families with incomes greater than $10,000, and those in white collar occupations. Conversely, females, Negroes, persons of Spanish ethnic origin, the youngest (18-34) and oldest age groups (65 or older), those who did not complete elementary school education, those in families with incomes less than $5,000, and those in unskilled occupations, such as laborers and private household workers, were less likely to be registered and vote.[151]

The proportion of people not participating in the election process, a measure of the underinclusiveness of voter registration lists as a source, has been steadily increasing since 1960. In the 1972 presidential election, 27% of those eligible did not register, and 37% did not vote.[152] In the 1974 nonpresidential election, 38% of those eligible

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voter registration lists. The challenge was denied; defendants were acquitted, so there was no appeal.

4) People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974). The source was a permanent pool supplemented with voter registration lists. The challenge was granted based on discrimination against women and students, and a new pool was constituted.

149. See note 5 *supra*.

150. In addition to the Census Bureau studies discussed in the text, see JURY SELECTION PROCEDURES, *supra* note 4, at 88-93, App. F-I: COMMITTEE FOR THE STUDY OF THE AMERICAN ELECTORATE, NON-VOTER STUDY 1976 (Sept. 5, 1976) (available from the Committee at 421 New Jersey Ave., S.E., Washington, D.C. 20003) [hereinafter cited as NON-VOTER STUDY 1976]; ROSENSTONE AND WOLFINGER, THE EFFECT OF REGISTRATION LAWS ON VOTER TURNOUT (1976) (presented to the 1976 Annual Meeting of the American Political Science Assoc.); W. FLANIGAN & N. ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 9 (1975); Note, *Voter Registration Lists: Do They Represent a Cross-Section of the Community?*, 5 J.L. REF. 385 (1971-72).

151. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOV., 1972, SERIES P-20, NO. 253, at 1 (1973). *See also* JURY SELECTION PROCEDURES, *supra* note 4, at 88-90; BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOV., 1974, SERIES P-20, NO. 293 (1976); VOTING AND REGISTRATION IN THE ELECTION OF NOV., 1970, SERIES P-20, NO. 225 (1971); VOTING AND REGISTRATION IN THE ELECTION OF NOV., 1964, SERIES P-20, NO. 143 (1965). The Census Bureau studies are hereinafter cited as VOTING AND REGISTRATION IN THE ELECTION OF [YEAR].

152. VOTING AND REGISTRATION IN THE ELECTION OF 1972, *supra* note 151, at 22.

did not register and 55% did not vote.[153] In the 1976 presidential election, 33% of those eligible did not register and 41% did not vote.[154]

The data provided by the Census Bureau studies are summarized in Tables C and D. Table C presents, from nationwide data for the 1972 and 1973 elections, the underinclusiveness (in colunms 1 and 3) and unrepresentativeness (in columns 2 and 4), measured by the comparative disparity standard, of voter registration lists regarding the various categories of the population specified. The proportion of the whole population not appearing on voter registration lists was 27.7% in 1972 and 37.8% in 1974. These large segments of the population have no opportunity to serve as jurors; they are excluded from jury service by the use of voter registration lists as the source.

This large underinclusiveness is not evenly distributed among the various races, age groups, occupations, or income levels in the population. The proportions excluded are considerably higher for nonwhites, people under 40 years old,[155] people with less formal education, people employed in blue collar positions or unemployed, and people with annual incomes of less than $10,000. Columns 2 and 4 indicate that the people in these categories[156] are significantly underrepresented.[157]

Table D presents the underinclusiveness data for various states and metropolitan areas from the 1974 election study,[158] which indicate that the inadequacy of voter registration lists as the source is not limited to any particular area but is nationwide.

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153. VOTING AND REGISTRATION IN THE ELECTION OF 1974, *supra* note 151, at 11.

154. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, VOTER PARTICIPATION IN THE ELECTION OF NOV., 1976, *Advance Report*, SERIES P-20, No. 304 (Dec., 1976) (based on a preliminary study).

155. Elderly people are also seriously underrepresented. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 35-39.

156. The underrepresentation of people in more than one of these categories is even more severe. For example, young blacks are underrepresented more than either young people or black people. *E.g.*, VOTING AND REGISTRATION IN THE ELECTION OF 1974, *supra* note 151, Table 1.

157. The Census Bureau has noted in its studies that these underrepresentations are actually significantly larger than their studies indicate, due to biases inherent in their procedures that cause an undercount of racial minorities, young people, and low income people. *See* VOTING AND REGISTRATION IN THE ELECTION OF 1972, *supra* note 151, at 7-8; SHRYOCK AND SIEGEL, THE MATERIALS AND METHODS OF DEMOGRAPHY (U.S. Government Printing Office 1973); Siegel, *Estimates of Coverage of the Population by Sex, Race, and Age in the 1970 Census*, 11 DEMOGRAPHY 1 (1974).

158. Data concerning representativeness is not available.

Table C

Representativeness and Inclusiveness of Voter Registration Lists Nationwide[159]

Category	1972 Election % Not on Registration Lists	1972 Election % Over- or Under-represented	1974 Election % Not on Registration Lists	1974 Election % Over- or Under-represented
Whole population	27.7	—	37.8	—
Sex				
Men	26.9	+1.0	37.2	+1.0
Women	28.4	−1.0	38.3	−0.8
Race				
White	26.6	+1.5	36.5	+2.1
Black	34.5	−9.4	45.1	−11.7
Spanish origin	55.6	−38.6	65.1	−43.9
Age				
18 to 20	41.9	−19.6	63.6	−41.5
21 to 24	40.5	−17.7	54.7	−27.2
25 to 29	33.9	−8.6	48.6	−17.4
30 to 34	28.8	−1.5	41.4	−5.8
35 to 44	25.2	+3.5	33.3	+7.2
45 to 54	20.7	+9.7	27.5	+16.6
55 to 64	19.8	+10.9	24.9	+20.7
65 to 74	21.5	+8.6	27.0	+17.4
75 and over	19.3	+11.6	34.8	+4.8
Education				
Years Completed				
Elementary				
0 to 4	51.8	−33.3	60.7	−36.8
5 to 7	40.5	−17.7	48.2	−16.7
8	32.0	−5.9	38.9	−1.8
High School				
1 to 3	37.0	−12.9	45.7	−12.7
4	26.0	+2.4	38.1	+0.5
College				
1 to 3	18.3	+13.0	33.1	+7.6
4	12.9	+20.5	25.2	+20.3
5 or more	11.2	+22.8	22.1	+25.2
Not enrolled in school				
18 to 20	50.3	−31.3	—	—
21 to 24	44.1	−22.7	—	—

159. All of the data presented in Tables C and D is derived from the Census Bureau's VOTING AND REGISTRATION IN THE ELECTION OF 1972 and VOTING AND REGISTRATION IN THE ELECTION OF 1974, *supra* note 151, and the categories listed were established and defined by the Census Bureau. "Percentage Not on Registration Lists" was calculated by subtracting the percentage that is registered, which appears in the Census Bureau studies, from 100%. "Percentage Over- or Underrepresented," on Table C, is measured by the comparative disparity standard, which reduces to

$$\left[1 - \frac{\text{Proportion of those in the specified category that are registered}}{\text{Proportion of the population that is registered}}\right] \times 100.$$

The proportion of those in the specified category that are registered and the proportion of the population that is registered appear in the Census Bureau studies. Underrepresentations are shown as negative and overrepresentations as positive. *See also* JURY SELECTION PROCEDURES, *supra* note 4, at App. F-I.

Category	1972 Election % Not on Registration Lists	1972 Election % Over- or Under-represented	1974 Election % Not on Registration Lists	1974 Election % Over- or Under-represented
Employment Status				
Agriculture				
Wage and salary	47.9	−27.9	50.2	−19.9
Self-employed	13.4	+19.8	19.1	+30.1
Nonagriculture industry				
Wage and salary	38.8	−15.4	40.0	−3.5
Self-employed	20.7	+9.7	28.7	+14.6
Government employed	15.6	+16.7	24.0	+22.2
Unemployed	42.7	−20.7	55.7	−28.8
Occupational Groupings				
White collar workers	17.6	+14.0	28.9	+14.3
Professional & technical	13.3	+19.9	25.3	+20.1
Managers & administrators	16.9	+14.9	25.9	+19.1
Sales	19.8	+10.9	31.2	+10.6
Clerical	21.0	+9.3	32.2	+9.0
Blue collar workers	35.1	−10.2	45.7	−12.7
Craftsmen	29.8	−2.9	40.8	−4.8
Operatives	39.3	−16.0	48.1	−16.6
Transport eqt. operatives	34.0	−8.7	39.7	−3.1
Laborers	40.1	−17.2	51.9	−22.7
Service workers	31.8	−5.7	41.9	−6.6
Private household workers	37.1	−13.0	44.6 (only women)	−10.9
Other	31.0	−4.6	41.7	−6.3
Farm workers	24.0	+5.1	29.6	+13.2
Farmers & Farm managers	11.2	+22.8	16.0 (only men)	+35.1
Farm laborers & foremen	43.4	−21.7	43.0	−8.4
Income				
Under $3,000	38.8	−15.4	—	—
$3,000 to $4,999	35.9	−11.3	—	—
Under $5,000	—	—	47.8	−16.1
$5,000 to $7,499	34.3	−9.1	—	—
$7,500 to $9,999	29.1	−1.9	—	—
$5,000 to $9,999	—	—	43.1	−8.5
$10,000 to $14,999	22.3	+7.5	35.3	+4.0
$15,000 and over	15.0	+17.6	—	—
$15,000 to $19,999	—	—	28.6	+14.8
$20,000 to $24,999	—	—	26.4	+18.3
$25,000 and over	—	—	22.4	+24.8

Table D

Inclusiveness of Voter Registration Lists: States and Metropolitan Areas[160]

State	Inclusiveness	% Not on Registration Lists	Metropolitan Area	Inclusiveness	% Not on Registration Lists
California	58.7	41.3	Atlanta, Ga.	62.3	37.7
Florida	56.1	43.9	Baltimore, Md.	61.8	38.2
Georgia	61.2	38.8	Boston, Mass.	68.7	31.3
Illinois	66.9	33.1	Chicago, Ill.	65.0	35.0
Indiana	69.6	30.4	Cleveland Ohio	66.2	33.8
Massachusetts	69.2	30.8	Dallas, Texas	52.5	47.5
Michigan	63.1	36.9	Denver, Colo.	67.2	32.8
Missouri	63.9	36.1	Detroit, Mich.	65.0	35.0
New Jersey	61.9	38.1	Houston, Texas	57.0	43.0
New York	57.8	42.2	Kansas City, Kan./Mo.	63.3	36.7
North Carolina	55.9	44.1	Los Angeles, Ca.	58.4	41.6
Ohio	60.6	39.4	Miami, Fla.	49.9	50.1
Pennsylvania	70.6	29.4	Milwaukee, Wis.	64.7	35.3
Texas	56.6	43.4	Minneapolis-St. Paul, Minn.	81.3	18.7
Virginia	54.0	46.0	Newark, N.J.	64.0	36.0
			New York, N.Y.	51.1	48.9
			Philadelphia, Pa.	67.7	32.3
			St. Louis, Mo.	64.3	35.7
			San Francisco, Ca.	60.4	39.6
			Washington, D.C.	54.8	45.2

Thus, voter registration lists are substantially unrepresentative and underinclusive. It has been suggested, however, that registration or actual voter lists are the most appropriate source because they include the "most concerned," "most competent," or "best" citizens. This argument reflects subjective, unsupported judgments about voters and nonvoters and a theoretical stance that directly contradicts basic constitutional and democratic principles.

There is no factual support for the notion that the almost one-half of our people who did not vote (or the third not registered) in the 1976 election are unconcerned, incompetent,[161] or unintelligent.[162] More-

160. *See* note 159, *supra*.

161. There is substantial evidence that the expert, "blue ribbon" or elite jury in fact yields no more quality or integrity of judgment than the representative jury. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 15-19, 88-93; Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970); *Implementation in the Fifth Circuit, supra*, note 27, at 349-50; S. REP. No. 891, 90th Cong., 1st Sess., 18-23 (1967).

162. Rather, the available evidence indicates that nonvoters view elections, the electoral or political process, the issues presented or ignored, and/or the choice presented by the candidates and major parties differently than voters. NON-VOTER STUDY 1976, *supra* note 150, at 3, concluded, based on a survey of nonvoters, that nonvoters have a "distrust of, and disaffection from major political and economic institutions, political leadership, and the media," not a lack of interest or concern. *See also* VOTING AND REGISTRATION IN THE ELECTION OF 1972, *supra* note 151, at 6; *Implementation in the Fifth Circuit, supra* note 27, at 350. The U.S. Commission on Civil Rights has concluded

over, the search for the "best" jurors, whether one believes them to be on voter registration lists or elsewhere, necessarily involves subjective judgments and intentional discrimination.[163] It is not a legitimate basis for constructing or evaluating a jury system.[164] From a societal and constitutional perspective, subjective notions of quality have no

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that people vote when and if the issues or candidates interest or concern them, citing the following example:

> In Alabama, the Negro turnout for the May 3, 1966 primary was estimated at 74% of the total Negro registration of just under 250,000; in the general election, faced with a choice between two segregationists who were the major candidates in the Governor's race, less than half the registered Negroes voted.

Id. at 350 n.85. Registration procedures also serve as a significant deterrent to registration and voting. *See* ROSENSTONE AND WOLFINGER, THE EFFECTS OF REGISTRATION LAWS ON VOTER TURNOUT (1976) (presented to the 1976 Annual Meeting of the American Political Science Assoc.); JURY SELECTION PROCEDURES, *supra* note 4, at 91-93.

One aspect of our electoral system, when compared to the systems in other countries, helps explain the lack of voter interest more than any negative judgments about nonvoters. Ours is a two-party, winner-take-all system, where compromises must be made and coalitions built in advance of elections since the loser, no matter how large his or her minority is, loses all. One result of this is a tendency toward moderation and a hesitance to address questions of principle on the part of our major candidates and parties. In a parliamentary or proportional, multi-party system, each party and candidate has power in proportion to the votes they receive. Since compromises and coalitions are made after the election, voters are provided with wider issue-oriented and ideological choices. It should not be surprising that voter turnout is significantly higher in countries with proportional, multi-party systems than in the United States. For example, in recent elections, the voter turnout was 94% in Australia and 80% in England. JURY SELECTION PROCEDURES, *supra* note 4 ,at 91-92. That voter turnout is directly related to this structural difference was dramatically demonstrated in Switzerland in 1919, when a change to proportional representation doubled the voter turnout in many districts (from 40% to 80%). *See* S. LIPSET, THE FIRST NEW NATION 310 (1963).

163. Selection systems that provide officials broad discretion to select jurors have consistently resulted in underrepresentation of racial and ethnic minorities, people of lower economic and social status, women and young people. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 15-16, 23-44, App. F-I; *Juror Selection, supra* note 1, at 806; S. REP. No. 891, 90th Cong., 1st Sess., 10, 19, 23 (1967); *Federal Jury Selection: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., at 48-49, 56 (Attorney General Ramsey Clark), 255 (Judge Irving Kaufman) (1967). In Witcher v. Peyton, 405 F.2d 725, 727 (4th Cir. 1969), the court said, "It is a simple truth of human nature that we usually find the 'best' people in our own image, including, unfortunately, our own pigmentation." During the evidentiary hearings concerning a jury composition challenge in the state court in Philadelphia, jury selection officials were asked to define "good character," a standard they used for selection. The responses, from the transcript, included: "His mannerisms, the way he speaks"; "belief in an almighty"; "moral or ethical values"; no "personality faults". Concerning the standard "antagonism to our form of government," their responses included "no respect for government" and "doesn't believe in the jury system, law and order, judges, or anything else." *Juror Selection, supra* note 1, at 806. At the initial stage of this process, in which judges, law clerks, tipstaffs, secretaries and a sheriff were asked to select names, without provision of any standards, from a source list on which each person's occupation appeared, they selected "people with 'better' jobs who were not 'too busy' to serve. Unemployed persons were totally excluded by some and at least disfavored by the rest." *Id.* at 799.

164. See authorities cited note 40 *supra*. In Glasser v. United States, 315 U.S. 60, 86 (1942), the Court said selection officials "must not allow the desire for competent

place in a jury selection system, and the best jury system is one that is representative of a cross section of the community.

It has also been suggested that voter registration lists are the best *single* available list.[165] They may well be;[166] but there is no legitimate reason for limiting jury sources to one list.[167]

B. Application of Constitutional Principles

The constitutional principle that jury systems be representative of a cross section of the community applies to source lists,[168] so that a substantial disparity between the representation of a cognizable class in the source and in the population establishes a prima facie case of invalidity.[169] No particular type of source list or method of compiling the

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jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community." Professor Van Dyke has noted that

> [e]xcluding certain people from participation in [the jury] process because, for one reason or another, they have not voted or do not want to vote contradicts the system itself. It further alienates those who may already be alienated, instead of providing them with an opportunity to participate and thus, ideally, to become more involved in society. Serving on a jury is not meant to be a reward for good citizenship; it is an opportunity and a responsibility that derives from citizenship itself.

JURY SELECTION PROCEDURES, *supra* note 4, at 91.

165. *See, e.g.*, S. REP. NO. 891, 90th Cong., 1st Sess. 16-17; *Implementation in the Fifth Circuit, supra* note 27, at 368.

166. The Federal Act provides:

> State, local, and Federal officials have custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application of the Attorney General of the U.S. to compel compliance with this subsection by appropriate process.

28 U.S.C. § 1863(d). Nevertheless, the two lists that are generally more representative than voter registration, Census and Social Security, have been traditionally regarded as confidential. 13 U.S.C. §§ 8, 9 and 15 C.F.R. § 60 (1977) (census lists); 42 U.S.C. § 1306 and 20 C.F.R. § 401 (1976) (Social Security lists). For a general discussion, see JURY SELECTION PROCEDURES, *supra* note 4, at 98-100, suggesting that these lists be made available.

167. The Report of the President's Commission on Registration and Voting Participation (Nov., 1963) recommended that registration lists not be used for jury selection since such use deters people from registering. This consideration was cited in the Commissioner's Comment to § 5 of the Uniform Jury Selection and Service Act, which requires use of multiple lists. *See also* the comments of Sen. Edward Kennedy in this regard, 121 CONG. REC. S.5985-87 (daily ed. April 15, 1975).

168. Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("the jury wheels [source lists], pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups or the community and thereby fail to be reasonably representative thereof").

169. Taylor v. Louisiana, 419 U.S. 522 (1975); Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); King v. Cook, 298 F. Supp. 584 (N.D. Miss. 1969).

source list has been invalidated. In this regard, all the courts have said is that a source that is itself discriminatory, such as a list maintained on a segregated basis,[170] or one that is clearly a subterfuge for discrimination[171] is invalid.[172] Tax lists, property lists, actual voter lists, and even the "key man" system, where "key" people select names for the source from people they know or have heard about, have not been *per se* invalidated.[173] Voter registration lists have been uniformly upheld as a valid single source list,[174] although several courts have expressed substantial doubts about their representativeness.[175]

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170. Sims v. Georgia, 389 U.S. 404 (1967); Whitus v. Georgia, 385 U.S. 545 (1967); Arnold v. North Carolina, 376 U.S. 773 (1964).

171. Simmons v. United States, 406 F.2d 456 (5th Cir. 1964), *cert. denied*, 395 U.S. 982 (1969); King v. Cook, 298 F. Supp. 584 (N.D. Miss. 1969); United States v. Van Allen, 208 F. Supp. 331 (S.D. N.Y. 1962), *modified*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

172. The courts have not considered whether selection officials may deliberately overrepresent a particular group in the source in order to assure that, even though they are disproportionally eliminated in the selection process, they will be proportionally represented in the pool. For example, in a jurisdiction that is 50% women and in which it is known that women request and receive excuses more than men, it may be constitutional or even constitutionally required for selection officials deliberately to compile a source that is more than 50% women in order to assure that the pool is 50% women. This is different from purposely *under*representing women as a matter of administrative convenience because they ask to be excused anyway, which results in additional underrepresentation of women since some are excluded who would not request or receive an excuse. Pursuant to the representativeness principle, the primary concern is that the pool be representative of a cross-section of the community and that the selection system be designed to yield such a pool. In the example, women are 50% of the population, and they should be fully represented in the pool although many cannot serve.

A harder question is presented when a group is underrepresented in the pool because of eligibility problems. For example, should selection officials overrepresent Mexican-Americans in the source to assure that they are fully represented in the pool even though they will be disproportionally disqualified, because many cannot meet the language requirement? Again, the fact that many in this group are not eligible does not mean that the group should be underrepresented or have a smaller voice in the jury system. If selection officials are able to find sufficient numbers of people in such a group who are eligible without an undue burden, it would seem to be consistent with constitutional and democratic principles to assure their representation in and the cross-sectionality of the pool.

173. Castaneda v. Partida, 97 S. Ct. 1272 (1977); United States v. Freeman, 514 F.2d 171 (8th Cir. 1971); United States v. Grant, 475 F.2d 581 (4th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973); United States v. Butera, 420 F.2d 564 (1st Cir. 1970); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); United States v. Hunt, 265 F. Supp. 178 (W.D. Tex. 1967), *aff'd*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). Although the key man system seems to be invalid pursuant to the "systematic exclusion" line of cases, see text accompanying notes 51-55 *supra*, the courts, while disfavoring this system, have not ruled it invalid per se.

174. Hallman v. United States, 490 F.2d 1088 (8th Cir. 1973); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); Chance v. United States, 322 F.2d 201 (5th Cir. 1963), *cert. denied*, 379 U.S. 823 (1964).

175. Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. 1974); Pullum v. Greene, 396 F.2d 251, 255 (5th Cir. 1968); Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414,

Several recent lower court decisions,[176] decided before *Partida*, seem to require considerably more than proof of a substantial disparity to establish a prima facie case. These cases are best exemplified by *United States v. Test*,[177] recently decided by the Tenth Circuit.[178] In *Test* the defendants challenged use of the voter registration list as the single source list in the District of Colorado. They introduced evidence that Chicanos comprise approximately 10.4% of the voting age population but only 6.9% of the registered voters.[179] The court held that this proof failed to "establish a prima facie case of systematic exclusion"[180] since the absolute disparity, of approximately 4%, was less than the 16% absolute disparity referred to in *Swain v. Alabama*.[181] The comparative disparity, not referred to in the opinion, was 33%.

Of course, there could never have been an absolute disparity of 16% concerning Chicanos, since they comprised only 10.4% of the population; even total exclusion of Chicanos would not have met the court's substantiality requirement.[182] The court explicitly rejected a statistical analysis and praised the use of "subjective" rather than "objective" criteria.[183] The court also seemed to require proof of

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427 (3d Cir. 1955); King v. Cook, 298 F. Supp. 584 (N.D. Miss. 1969); United States v. Hunt, 265 F. Supp. 178 (W.D. Tex. 1967), *aff'd*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). *See also* United States v. Grant, 475 F.2d 581 (4th Cir. 1973) (Winter, J., dissenting), *cert. denied*, 414 U.S. 868 (1973); United States v. Andrews, 342 F. Supp. 1261 (D. Mass.), *rev'd on procedural grounds*, 462 F.2d 914 (1st Cir. 1972). One court has held that use of voter registration lists as the sole source was unconstitutional, but the decision was quickly reversed on appeal. People v. Taylor, No. A-277-425 (Super. Ct. for Los Angeles County, Oct. 11, 1974), *vacated*, Civ. No. 45230 (Cal. Ct. App., 2d Dist., Nov. 26, 1974).

176. United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Goff, 509 F.2d 825 (5th Cir. 1975), *cert. denied*, 423 U.S. 857 (1975); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

177. 550 F.2d 577 (10th Cir. 1976).

178. The *Test* court also adopted the "substantial impact" test, discussed at text accompanying notes 125-35 *supra*.

179. 550 F.2d 577, 582-83 (10th Cir. 1976).

180. *Id.* at 587.

181. 380 U.S. 202 (1965). In *Swain*, the Court referred to an absolute disparity of 10-16% as a minimal showing for a prima facie case, but this has never been regarded by the Court as a minimum standard or even referred to in later opinions of the Court. See note 40 *supra*. The *Test* court adopted and mechanically applied the outside limit referred to in *Swain*, 16%, as a necessary requirement for proof of a substantial disparity, stating that in *Swain* the Court "implicitly held that a prima facie case of systematic exclusion was not established by demonstrating a disparity of as much as 16%." 550 F.2d at 577, 587 (10th Cir. 1976). See note 81 *supra*.

182. The court did observe that "token" representation may establish a prima facie case, 550 F.2d 577, 586, but no line or concrete exception to the 16% absolute disparity requirement was suggested.

183. The court said:

> Defendants' 'standardized' approaches merely present alternative methods of measuring departures from a statistically ideal cross section of the community. Irrespective of the analytical approach selected, the process of characterizing

some discrimination in addition to the discrimination inherent in the use of the voter registration list. First, citing Supreme Court decisions discussing the "opportunity to discriminate," a concept derived from early systematic discrimination cases that invalidated jury systems solely on the basis of such opportunity,[184] the court required proof of some opportunity to discriminate beyond the opportunity inherent in the choice of the source list or lists. In addition, the court ruled that the defendants could not establish a prima facie case "simply because an identifiable group votes in a proportion lower than the rest of the population" and seemed to require proof of electoral discrimination,[185] as if registration to vote were a qualification for jury service and the unrepresentativeness of the voter registration list were irrelevant. This reasoning is tautological, since it allows voter registration lists to be upheld by their bootstraps: all disparities between a voter registration list and the population result from an identifiable group voting in a proportion lower than the rest of the population,[186] and to validate the use of voter registration lists on this basis is to validate all voter registration lists, no matter how unrepresentative.[187]

> the 'substantiality' of the data derived therefrom remains a subjective function. . . . What defendants in effect urge is that we reject the collective experience of the courts . . . and instead allow ourselves to be 'led' by defendants' visceral reactions to the substantiality of the disparities demonstrated below.

550 F.2d 577, 589. The defendants had offered a statistical analysis, not a visceral reaction; the court applied its "subjective" and visceral reaction and a mechanical rule that legitimizes discrimination against small and medium sized minorities.

184. See note 59 *supra*.

185. 550 F.2d 577, 586 & 586 n.8. *See also* United States v. Freeman, 514 F.2d 171 (8th Cir. 1975); United States v. Guzman, 468 F.2d 1245 (2d Cir.), *cert. denied*, 410 U.S. 937 (1972); United States v. James, 453 F.2d 27 (9th Cir. 1971).

186. In United States v. Burkett, 342 F. Supp. 1264, 1265 (D. Mass. 1972), Judge Wyzanski said:

> The defendant has a right . . . not to have the pool diminished at the start by the actions or inactions of public officials, nor by the inertia, indifference, or inconvenience of any substantial group or class who do not choose to vote or to serve on juries. From the viewpoint of a black, or young, or poor, or rich defendant, his interest is in having a pool with a fair proportion of blacks, young, poor, and rich. To him it is a matter of indifference as to whether a diminished pool is due to action or inaction or third persons, whether public or private. In substance, the defendant is entitled to require that the public officials charged with jury selection, including judges who excuse jurors, proceed in such a way as to compel the calling of all eligible for jury duty who do not have socially valid excuses. In this connection jury duty is an obligation owed to the defendant, not a privilege which at the juror's pleasure the juror may choose to exercise or forego.

187. "The use of voter lists is not the end sought. Rather, that is the principal source. If the source is deficient or infected its use alone will not suffice," Broadway v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971). Similarly, to reject a challenge to the use of voter lists on the grounds that nonvoters are not a cognizable class, as many courts have done, *see, e.g.*, United States v. Lewis, 472 F.2d 252 (3d Cir. 1973); United States v. Dangler, 422 F.2d 344 (5th Cir. 1970); United States v. Van Allen, 208 F. Supp. 331 (S.D. N.Y. 1962), *modified*, 349 F.2d 720 (2d Cir. 1965), *cert.*

From both a legal and mathematical perspective, a prima facie case of invalidity of a source or pool should be established by proof of a comparative disparity of at least 15%. This standard would have had the effect of requiring the government to justify the disparities in *Test*, *Jenkins* and *Goff*.[188] Furthermore, the "systematic exclusion" line of cases[189] yields an additional standard for evaluating source lists. Selection officials should not be required to go door to door to find every eligible person in a community. However, under the systematic exclusion standard, which requires proof of only a minimal disparity,[190] where a challenger can prove that a significantly[191] more representative list or combination of lists is available with reasonable cost and effort, the burden should shift to selection officials to justify their failure to use such lists. The choice of which list or lists will be utilized, whether made by a legislature, by a court, or by selection officials, is an intentional act, and any resulting discrimination is systematic.[192] The "systematic exclusion" cases have never required proof of an improper motive or a lack of good faith. If selection officials cannot, pursuant to the systematic exclusion standard, choose women from the source less frequently than men because men are thought to be better jurors or because women usually ask to be excused anyway,[193] surely they cannot choose to utilize a source list that underrepresents women or any other cognizable class, for the same or other purposes, when another list or combination of lists is available that would remedy the imbalance with reasonable costs and effort.

In sum, based on analysis of the interests underlying the representativeness principle (and the rule of exclusion), it is suggested that a constitutional violation has occurred if the comparative disparity between a source list and the population is greater than 15% concerning

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denied, 384 U.S. 947 (1966), is to base the decision on a nonsequitur. The question is whether the list is representative of cognizable classes.

188. Since these courts held that the challengers failed to establish a prima facie case, we do not know whether the disparities proved were justifiable. Following the initiation of the challenge in *Test*, the district court adopted a multiple list system. See note 199 *infra*.

189. "Systematic exclusion cases" refers to the line of cases in which proof of actual systematic or intentional discrimination was presented, as opposed to proof only of a disparity. See text accompanying notes 51-55 *supra*.

190. See note 51 *supra*.

191. "Significantly more representative" is used to connote a standard that is less stringent than the "substantial disparity" or "substantial deviation" standards. If the comparative disparity standard is adopted, it would be appropriate to consider an additional list or combination of lists significantly more representative if it will lower the comparative disparity by 10%.

192. *See* Foster Appendix, *supra* note 1, at 823, 828.

193. *See* United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); People of New York v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (1974).

any cognizable class or if a source list is less than 80% inclusive,[194] unless the unrepresentativeness or underinclusiveness can be appropriately justified in terms of eligibility or availability.[195] If use of a single source list, such as a voter registration list, or a multiple source list results in a violation of these standards, supplementation by additional lists to correct the violation should be constitutionally required.[196]

The failure of the courts to formulate and enforce appropriate standards for source lists has confused the issues and eroded the constitutionally mandated representativeness principle. The rules advocated here would provide the courts with understandable and workable standards that could secure and safeguard the representativeness principle while providing due consideration to administrative feasibility.

C. Statutory Mandate for Multiple Lists

Although the legislatures have left the task of formulating standards of representativeness to the courts, federal and state statutes presently in effect require use of multiple source lists when single lists are not representative.

1. *The Federal Act.* The Federal Act provides that "voter registration lists or lists of actual voters" are to be the primary source and that each district "shall prescribe some other source or sources of names . . . where necessary to foster the policy [of representation of a cross section of the community]."[197] Although the language of this provision clearly requires supplementation where voter lists are not representative, and the legislative history supports that interpretation,[198]

194. Pursuant to the intentional or "systematic exclusion" line of cases, it is also concluded that a prima facie constitutional violation is established by proof that a significantly more representative (resulting in a reduction of 10% in the comparative disparity) or significantly more inclusive (resulting in an addition of at least 10% to the inclusiveness) list or combination of lists is available.

195. A justification based on eligibility is appropriate only concerning a stage in the process before which eligibility criteria have been applied. See notes 68 & 172 *supra*. The representativeness principle places an affirmative duty on selection officials and limits the availability justification to situations in which, even with affirmative efforts, sufficient numbers of persons in specific categories cannot be made available. See notes 70 & 172 *supra*.

196. With a multiple source list, it is possible that the disparity can best be remedied by eliminating one or more of the lists used.

197. 28 U.S.C. § 1863(b)(2).

198. The Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353 (1967), which drafted the Act, states that, although supplementation was not envisioned for most districts, "the committee's draft bill requires the use of other lists in addition to the voter lists to obtain the representative cross-section." *Id.* at 362. The Senate Report recognizes the particular importance of the source stage in terms of the purposes of the Act, and states:

> The bill *requires* that voter lists be supplemented by other sources whenever they do not adequately reflect a cross-section of the community. . . .
>
> The voting list requirement, together with the provisions for supplementa-

only two districts supplement voter lists,[199] and no court has as yet ordered supplementation.[200]

The failure to implement this provision is not because of a lack of challenges.[201] Most of the decisions have required proof of a constitutional violation and have adopted the substantial impact and electoral discrimination standards discussed above,[202] even though the Act clearly establishes less stringent standards.[203] The Act requires representation of a cross section of the community and mandates that relief (supplementation) be granted where there is a "substantial" deviation.[204]

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tion . . . is therefore the primary technique for implementing the cross-sectional goal of this legislation. . . . . [*A*]*ny substantial percentage deviations must be corrected by the use of supplemental sources.*

. . . .

[T]he bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the Act, by reason of local voting practices. Where that is true, the plan *must* prescribe other sources to supplement the voter lists.

S. REP. No. 891, 90th Cong., 1st Sess. 17, 27 (1967) (emphasis added). The House "adopt[ed] for its report the Senate committee report." H.R. REP. No. 1076, 90th Cong., 2d Sess. 3 (1968). In a brief submitted to the Supreme Court, Solicitor General Robert Bork stated that "Congress intended that voter lists be supplemented by other sources where the use of voter lists results in substantial failure to achieve the cross-sectional goal." Brief for the United States, Test v. United States, No. 73-5993, at 15. See also Foster Appendix, *supra* note 1; WORKS, *supra* note 27, at 64.

199. *See* Modified Plan for the U.S. District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors (March 16, 1976) and Amended Plan for the Random Selection of Grand and Petit Jurors in the U.S. District Court for the District of Colorado (August 18, 1975), on file with the Administrative Office of the U.S. Courts, Washington, D.C., both of which provide for supplementation of voter registration lists. These are the only two districts, out of a total of 94, that have used supplemental lists. Letter of September 23, 1976 from William R. Burchill, Jr., Associate General Counsel of the Administrative Office of the U.S. Courts, to David Kairys, on file at the *California Law Review*.

200. *But see* Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. 1974); United States v. Grant, 475 F.2d 581 (4th Cir. 1973) (Winter, J., dissenting), *cert. denied*, 414 U.S. 868 (1973).

201. See cases cited notes 12-17 *supra* & 202 *infra*.

202. *E.g.*, United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. Jones, 480 F.2d 1135 (2d Cir. 1973); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973); United States v. Dangler, 422 F.2d 345 (5th Cir. 1970); United States v. Gordon, 455 F.2d 398 (8th Cir. 1972); United States v. Ross, 468 F.2d 1213 (9th Cir. 1972). In a brief presented to the Supreme Court, Solicitor General Robert Bork stated that, pursuant to the Act, "substantial underrepresentation of a cognizable group . . . would necessitate resort to supplementary sources . . . even though no history of voter discrimination against the group is proved." Brief of the United States, Test v. United States, No. 73-5993, at 13-14.

203. Indeed, these cases also misconstrue the actual constitutional standard, since, although the courts use the term "systematic exclusion," they only require an inference of discrimination from proof of a "substantial disparity." See text accompanying notes 32-73 *supra*.

204. 28 U.S.C. § 1867(d). See authorities cited notes 15 & 198 *supra*.

The Committee on the Operation of the Jury System of the Judicial Conference of the United States, which drafted the Act, has noted "the increasing number of cases challenging the process of jury selection" and has responded with proposals regarding source lists.[205] Unfortunately, rather than encouraging enforcement of the supplementation provision or investigating the representativeness of voter lists, the Committee has proposed an amendment to the Act that would "establish a presumption that names of prospective jurors contained in voter lists represent a fair cross-section of the community."[206] The basis for this presumption is surely not factual,[207] since all available data directly opposes it.[208] The Committee's proposal would define away a serious problem, and sacrifice the basic principles of the Act.[209]

The Act provides the basis for representative and inclusive source lists in the federal courts; all that is required is enforcement by the courts.

2. *The Uniform Act.* The Uniform Act, adopted in five states,[210] provides that:

> "The jury commission for each [county] [district] shall compile and maintain a master list consisting of all [voter registration lists] [lists of actual voters] for the [county] [district] supplemented with names from other lists of persons resident therein, such as lists of utility customers, property [and income] taxpayers, motor vehicle registrations, and drivers' licenses, which the [Supreme Court] [Attorney General] from time to time designates."[211]

The Commissioners' Comment to this provision states that supplementation is "mandatory."[212]

The Uniform Act embodies provisions designed to maximize the representativeness and inclusiveness of sources and the entire jury system. There are no exemptions,[213] and all requests for excuse are re-

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205. REPORT, *supra* note 1, at 9.

206. *Id.*

207. The Committee's report does not state or refer to any factual basis; rather, the Committee said: "This proposal is a response to the increasing number of cases challenging the process of jury selection." *Id.*

208. See text accompanying notes 145-60 *supra*. The Uniform Act creates the opposite presumption and makes it irrebuttable, requiring use of multiple lists. See text accompanying notes 215-17 *infra*.

209. This proposal seems to suggest an implicit recognition of the deficiencies in the decisions construing the present supplementation provision. However, contrary to the apparent belief of its proponents, it would lead to more, not less, litigation, since the provision itself and the unrepresentative sources and pools it would spawn would be subject to constitutional attack.

210. See note 8 *supra*.

211. UNIFORM ACT, *supra* note 9, § 5.

212. UNIFORM ACT, *supra* note 9, Commissioners' Comment to § 5.

213. UNIFORM ACT, *supra* note 9, § 10.

solved on an individual basis by the court "only upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary . . . ."[214] Jurors are reimbursed for travel expenses and paid at a "more adequate [rate] than has commonly been provided" to compensate them adequately and to "reduce the occasions for excusing prospective jurors . . . because of financial hardship."[215] Length and frequency of service is limited,[216] and employers are prohibited from punitive actions because of absence from work.[217] Presumably, states adopting the Uniform Act will have representative and inclusive jury source lists and pools, making challenges rare.

IV

Methodology for Use of Multiple Lists

In order to achieve the representative source lists and pools required by the Constitution, relevant statutes, and societal considerations, multiple lists must be used. This section deals with the theoretical and practical aspects of implementing multiple-list systems,[218] and discusses various techniques for combining multiple lists and the choice of the lists to be used.

A. Methods for Combining Multiple Lists

Any multiple list plan must be governed by the fundamental principle that each person whose name appears on at least one of the lists used should have an equal chance of being selected, independent of the total number of lists on which the name appears. For example, if four lists are used and one individual is on all four lists while another individual is on only one list, then a procedure must be used that results in both having the same chance of selection. Otherwise, the result will be no better and may even be worse than with single list procedures.

At first glance, it may appear that implementation of a nondupli-

214. *Id.* at § 11. Experience with various excuses and exemptions has shown that any group offered a basis for not serving will take it. See note 4 *supra.* The provisions eliminating exemptions and narrowing excuses should result in a broader cross-section and widespread participation.

215. *Id.* at § 14, and Commissioners' Comment to § 14.

216. Uniform Act, *supra* note 9, § 15.

217. *Id.* at § 17.

218. For a general discussion see *Multiple Lists, supra* note 30, in which the authors present the theoretical basis and relevant equations concerning the procedures outlined here.

cating, multiple list procedure is both costly and time consuming.[219] However, simple methods have recently become available that can eliminate the effect of duplications and require only slight additional cost or time.[220]

The most straightforward procedure consists of combining the lists into a single master list on which all duplicates are eliminated and each individual is listed only once. In most jurisdictions only a small proportion of the people on a source would actually be called for jury duty, so that much of the effort of compiling such a master list is unnecessary. A better approach involves not combining the lists initially, but selecting random samples from each and then using a procedure regarding the names selected that insures each individual has an equal chance of being selected independent of the number of lists on which he or she appears.[221]

Such a procedure begins by ordering the lists to be used. For example, the voter registration list may be first, the driver's license list second, the public assistance list third, and the telephone list fourth. The particular ordering used does not influence the probability of any particular individual being selected, but it does affect the cost.[222] Once the lists have been ordered, they are still kept separate, but, for purposes of this procedure, they are regarded collectively as one long list containing many duplications. If a person's name appears on more than one list, it is regarded as "good" on the first list on which it appears, while all further appearances are regarded as duplicates or "blanks."[223] Using this definition, each person listed at least once has one good listing and possibly several duplicate listings or blanks.

In order to insure that each individual has an equal chance of being selected, only good listings can result in a person being selected, and all blank listings are ignored. Names are selected from each of the lists, and each selection is then checked to determine if it is good or blank. For example, a name selected from list 1 is automatically good. A name selected from list 2 must be checked against list 1. If

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219. *See, e.g., Facets of the Jury System, supra* note 5, at 13, where, without benefit of the techniques discussed here and based upon the experience in one jurisdiction, use of multiple lists is said to be "desirable" but "expensive". The problem of duplications has been cited as one of the primary reasons that multiple list systems have been viewed as impractical. *Implementation in the Fifth Circuit, supra* note 27, at 383. The author was not aware of the methodology discussed here.

220. On the costs, see text accompanying notes 236-40 *infra*.

221. These procedures also allow an updated version of any one or all of the lists to be used without requiring a re-compilation of an entire master list.

222. *See Multiple Lists, supra* note 30, at 212-18.

223. For example, is an individual were on lists 3 and 4, the listing on list 3 would be good and the one on list 4 would be a blank.

it is on list 1, the selection is blank, and if it is not on list 1, it is good. In general, a name from a particular list is good provided that it is not to be found on any of the lists preceding it in the order described above. The concept of good and blank names will give each individual an equal chance of selection if an appropriate number of names is selected randomly from each list. This can be accomplished in a number of ways, two of which are described here.[224]

One plan requires that a fixed sampling fraction of the names on each list be selected and checked. The total number of good names that will result from this process is not known in advance; it will be approximately the sampling fraction multiplied by the total number of good names on all lists.[225] Since all names on the first list are good and therefore require no checking, time and costs will often be minized by ordering the lists so that the longest is first.[226]

A second plan consists of two stages. First, after the lists are ordered, one of them is selected with a probability proportional to the total number of names on that list. A name is then chosen at random and checked as described above. If it proves to be a duplicate, it is discarded; otherwise, it is kept as a good selection. Then a list, perhaps the same, perhaps a different one, is again chosen at random and the checking procedure is followed. This continues until the required number of names has been selected. This method is quite flexible and is particularly useful when only a small number of names is required.

The costs and effort involved in use of multiple lists will depend on many factors, including the number of lists used, their lengths, the number to be selected, and whether or not the procedure is computerized. The most costly aspect is the checking procedure, implementation of which requires a method for determining whether a given name is on a particular list. There are three basic alternatives.[227]

First, checking can be accomplished manually.[228] The cost and

224. Five plans are presented and discussed in *Multiple Lists, supra* note 30, at 208-11.

225. For example, suppose the lists utilized are voter registration, licensed drivers, telephone and public assistance and they contain, respectively, 1,000,000, 800,000, 500,000 and 40,000 names. If the sampling fraction is 5%, then 50,000, 40.000, 25,000 and 2.000 names would be selected and checked from the voters, drivers, telephone and public assistance lists respectively. Of these 2,340,000 names, if 1,500,000 were good and 834,000 were blanks, then the yield of good names would be approximately 5% of 1,500,000 or 75,000. The sampling fraction can be varied to yield the required good names.

226. This is so if the cost of a check for each name and on each list is uniform throughout, which is not always the case.

227. Equations for computation of costs are presented in *Multiple Lists, supra* note 30, at 212-15.

228. See Table E *infra* for jurisdictions in which a manual checking procedure has been utilized.

time involved with this method are significant, but it has been used without undue expenditures.[229]

Second, computer programs are available that will check lists for duplications at a minimal cost.[230] These programs may not be able to detect all the duplications because of spelling mistakes and differing conventions for names, addresses, and districts. Failure to detect these duplications results in certain individuals having a slightly larger chance of selection; however, this bias should not be serious, for it is unlikely to affect a significant number of names, and no particular group should have a special concentration of these errors.

Third, checking can be accomplished by questionnaire.[231] Once a name is selected, a qualification questionnaire is usually sent to determine whether or not the individual meets the established requirements for jury service. In addition to the usual questions, each person can be asked to identify the lists on which his or her name appears. It is then a simple matter for selection officials to determine whether a selection was good or a blank. With such a procedure, the only added burden is the cost of mailing additional questionnaires.[232]

Finally, perhaps the best checking procedure from the standpoint of costs and complete accuracy is a combination of the computer and questionnaire techniques. A computer will eliminate almost all of the blanks. Any remaining blanks can be detected by use of the questionnaire technique. The additional costs of such a hybrid procedure over a single list procedure would be minimal.[233]

The methods for multiple list systems utilized in several jurisdictions are presented in Table E. Most of these jurisdictions have used the master list method and computerized checking procedures. However, three jurisdictions are using or are about to use the new methods discussed here for minimizing the number of names to be checked.

229. See text accompanying notes 236-40 *infra* concerning the costs.

230. See Table E, *infra*, for jurisdictions in which a computerized checking procedure has been used. Information concerning computer programs and methods for formatting the lists is available from Judicial Department, State of Colorado, 323 State Capital, Denver, Colorado 80203 (Attention: Rayma Jordon); Office of Court Administrator, 29th Judicial District, Kansas Courthouse, Kansas City, Kansas 66101 (Attention: Jerry Larson); Administrative Office of the Courts, 303 K St., Anchorage, Alaska 99501 (Attention: M. Martin).

231. No jurisdiction of which we are aware has utilized a questionnaire checking procedure.

232. The use of questionnaires raises the possibility that the information received could be inaccurate or unreliable, but experiences in similar situations have demonstrated that this is not a serious problem. The Census Bureau used this technique in its studies of voting and registration, determining who was registered and who voted by asking the respondents, and a check of the procedure revealed minimal inaccuracies and unreliability. *See Voting and Registration in the Election of 1972, supra* note 151, at 7-8.

233. This procedure has been recommended in San Diego County, California. See Bird Engineering—Research Associates. *The Use of Multiple Lists for Jury Selection, A Report to the Superior Court of San Diego County* (May 2, 1977).

Table E

Jurisdictions that Presently Use Multiple Lists[234]

Jurisdiction	Lists	Method of Combination	Implementation Technique	Present Status
U.S. District Court for the District of Colo.	Voter registration Licensed drivers	1	Computer	In use
U.S. District Court for the District of Columbia	Voter registration Licensed drivers	1	Computer	In use
Alaska (statewide)	Voter registration Fish and game Income tax	1	Computer	In use
California:				
San Diego Co.	Voter registration Licensed drivers	3	Under study	Under study
San Joaquin Co.	Voter registration Licensed drivers	1	Computer	In use
San Mateo Co.	Voter registration Licensed drivers	1	Computer	In use
Colorado (statewide)	Voter registration Licensed drivers City directory	1	Computer	In use
Idaho:				
Ada Co.	Voter registration Licensed drivers	1	Computer	In use
All other Counties (separately)	Voter registration Licensed drivers	1	Manual	In use
Wyandotte Co., Kansas	State census Voter registration	1	Computer	In use
Jefferson Co., Kentucky	Voter registration Property tax	*	Computer	In use
Hennepin Co., Minnesota	Voter registration Licensed drivers	3	Under study	Under study
St. Louis Co., Missouri	Voter registration Licensed drivers	1	Computer	In use shortly
North Dakota:				
Burleigh Co.	Actual voters Licensed drivers	3	Manual	In use
Canyon Co.	Actual voters Licensed drivers Utilities	1	Manual	In use
Ward Co.	Actual voters Licensed drivers	1	Manual	In use
New York:				
Bronx Co.	Voter registration Licensed drivers City income tax	*	Computer	Under study
Kings Co.	Voter registration Licensed drivers	*	Computer	In use
New York Co.	Voter registration City income tax	1	Computer	In use
Queens Co.	Voter registration Licensed drivers City income tax	*	Computer	Under study
Allegheny Co., Pennsylvania	Voter registration Telephone book Welfare	3	Manual	In use (Plan 3 system under study)

234. Table E was compiled by Bird Engineering—Research Associates (P.O. Box

Application of these techniques and the cost and effort involved can be illustrated by a recent example. Allegheny County, Pennsylvania (which includes Pittsburgh) has recently adopted the fixed fraction multiple list system (Plan 2) using three lists: voter registration, telephone and public assistance.

The total number of names, the number of "good" names, and the number of "checks" on each list are presented in Table F. Once the overlap has been determined, the sampling fraction, or the proportion of names to be selected from the lists, can be determined based on the total number of jurors needed.[235] In this instance, 50,000 names are needed, and 72,880 must be drawn from the lists in order to meet this requirement. In addition, a total of 29,647 checks must be made. The added tasks attributable to the use of multiple lists, in addition to conceptual and developmental tasks,[236] are drawing 22,880

37, Vienna, Virginia 22180), a firm with extensive experience in developing techniques and advising courts concerning multiple list methods for jury selection (the authors appreciate the assistance given by Bird, particularly by Chester Mount, Thomas Munsterman and William Pabst). The plan numbers listed under "Method of Combination" indicate the following: Plan 1 is the master list plan discussed *infra* at text accompanying notes 219-20 (*see Multiple Lists, supra* note 30, at 209, where this plan is also referred to as plan 1); Plan 2 is the proportional list selection plan discussed *infra* at text accompanying notes 224-26 (*see Multiple Lists, supra* note 30, at 210, where this plan is also referred to as plan 2); Plan 3 is the random list selection plan discussed *infra*, at text accompanying notes 226-27 (*see Multiple Lists, supra* note 30, at 210, where this plan is referred to as plan 4). An asterisk (*) means the lists are used without combination method to eliminate the effect of duplications.

235. The sampling fraction is 4.81%. It is determined from the equation:

$$N_0 = (N_1 + d_2N_2 + d_3N_3)f,$$

where,

N_0 = number of names needed,
N_1 = number of names on list 1,
N_2 = number of names on list 2,
N_3 = number of names on list 3,
d_2 = proportion of names on list 2 that are not on list 1,
d_3 = proportion of names on list 3 that are not on list 1 or 2, and
f = sampling fraction.

In this example,

$$50{,}000 = [921{,}000 + (.2016)559{,}000 + (.1630)35{,}000]f$$
$$f = 4.81\%$$

d_2 and d_3 are determined by a sample survey. The checks required for the telephone and public assistance lists are determined as follows. A total of $(.0481)559{,}000 = 26{,}980$ names will be selected from the phone book, all of which must be checked against the voters registration list. A total of $(.0481)35{,}000 = 1684$ names must be selected from the public assistance list. All of these names must be checked against the telephone book. Of the 1684 names, 611 will be found in the telephone book and be discarded as bad names. The remaining 1073 must be checked against the voters registration list which gives a total of $1684 + 1073 = 2757$ checks for the public assistance names.

236. The Federal Judicial Center and other agencies could reduce the costs and effort of development and programming by developing programs for using the various plans and making them generally available, as they have already done concerning the task of picking randomly from source lists.

additional names and checking 29,647 names. This has not yet been done in Allegheny County,[237] but cost figures for the same tasks are available from the experience in San Mateo County, California. If all the lists are available on computer tapes and therefore no keypunching is necessary,[238] the cost in computer time would be less than $30.00.[239] Compilation of a master list, which would require approximately 600,000 checks, would cost approximately $600.00 in computer time.[240]

Table F

Allegheny County, Pa. Multiple List System[241]

List	Total names	"Good" (non-duplicating) Names	Number of "Checks" Required (for 50,000 "good" names)
Voter registration	921,000	921,000	0
Telephone	559,000	112,694	26,890
Public Assistance	35,000	5,705	2,757
Total	1,515,000	1,039,399	29,647

B. Choice of Lists

Multiple list procedures are necessary to overcome the biases and exclusiveness inherent in available single lists. As more lists are employed, the total number of unique names increases, and the overall list becomes more inclusive. However, care must be exercised in choosing the lists to insure that no biases result. If a group is underrepresented on all the lists, it will be underrepresented in the combined source no matter how many lists are used. Moreover, supplementation with some lists can increase a group's underrepresentation or create an underrepresentation of another group.[242]

This observation indicates that if the purpose of using multiple lists is to be achieved, the additional lists utilized must overrepresent the groups underrepresented on the primary list.[243] The most widely used

237. Allegheny County plans to do the drawing and checking manually, and it is not known how long this will take or how much it will cost.

238. If the lists are not available on tapes and have to be keypunched, there is a significant additional cost.

239. In San Mateo County, computer time costs $63.00 per hour. The cost of computer time and the amount of time necessary vary with various machines and locations.

240. 600,000 checks would require approximately 20 times as much computer time, which would cost about $600.00.

241. These data are from Report of Dr. William Brinckloe to the Jury Commission of Allegheny County (May 29, 1974).

242. Care should always be taken that the use of lists that compensate for the underrepresentation of one group and/or increase inclusiveness does not result in underrepresentation of another group. For example, city directory and telephone customer lists will increase inclusiveness, but they seriously overrepresent men and higher income people. See note 244 *infra*.

243. *See* WORKS, *supra* note 27, at 109; JURY SELECTION PROCEDURES, *supra* note 4, at 98-104.

primary list is the voter registration list, which significantly underrepresents racial minorities, people under 40, those with lower incomes and less education, blue collar workers, and the unemployed. The lists chosen to supplement the voter registration list should therefore compensate for these specific deficiencies. Some commonly available lists, including lists of telephone and utility customers, city directories and tax lists, generally underrepresent the same groups as voter registration and actual voter lists.[244] However, public assistance[245] and unemployment lists generally give strong representation to people with lower socio-economic status and minority groups.[246] Licensed drivers' lists are typically a good source for young people and provide substantially increased inclusiveness.[247]

The advisability of various combinations will, of course, vary in different areas. Data from various jurisdictions indicate that generally voter registration lists combined with licensed drivers, public assistance and unemployment lists will provide representative and inclusive sources.[248] These and other lists should be examined and evaluated before determining which lists to use.[249]

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244. JURY SELECTION PROCEDURES, *supra* note 4, at 100-2.

245. In *Implementation in the Fifth Circuit*, *supra* note 27, at 384, Judge Gewin states, without citing any authority or indicating his basis, that public assistance lists are not useful because people on them are mostly excusable or disabled. He does not discuss unemployment lists. *See* JURY SELECTION PROCEDURES, *supra* note 4, at 102, recommending public assistance lists.

246. A 1975 study by the Department of Health, Education and Welfare determined that of the people receiving aid to families with dependent children, 50.2% were white, 44.3% were black, 1.1% were American Indian, .5% were Asian, and 3.9% were in some other minority or unknown. Of those classified in the study as white, about 13% were from a Spanish speaking background, mostly Mexican and Puerto Rican. NATIONAL CENTER FOR SOCIAL STATISTICS, POPULATION SURVEY (December 21, 1976). *See also* NATIONAL CENTER FOR SOCIAL SATISTICS, FINDINGS OF THE 1973 AFDC STUDY, DHEW PUBLICATION NO. (SRS) 74-03764 (1974) (provides detailed demographic data on public assistance recipients, some of which is broken down by states). For a demographic breakdown of unemployed people (not all of whom are on unemployment lists), see U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, Vol. 24, No. 4 (April, 1977) (published monthly); U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, Report 481 (1975).

247. JURY SELECTION PROCEDURES, *supra* note 4, at 102-4. In California, there were about 12 million licensed drivers in 1973, while as of 1970 there were only 8.7 million registered voters. *Id.* at 102. See CAL. CIV. PROC. CODE, § 204e (West Supp. 1977) which provides for use of licensed drivers lists with voter registration lists. In some counties in North Dakota, use of licensed drivers lists with lists of actual voters increased the number of people included by from 80% to 100% and greatly increased the number of young people. JURY SELECTION PROCEDURES, *supra* note 4, at 104.

248. These lists are typically computerized and are therefore easily used with computerized selection and checking procedures.

249. It is advisable to include demographic questions on jury questionnaires so the demographic composition of the source and pool will be known and appropriate changes can be made. Such data is also useful regarding possible challenges to the jury system.

Conclusion

This article advocates the adoption of concrete standards of representativeness or cross-sectionality for jury source lists and pools pursuant to the representativeness principle and the rule of exclusion. The representativeness principle embodies the fundamental right of litigants to a fair trial, the right of citizens to serve on juries, and the societal interest in the legitimacy, integrity and impartiality of the judicial process. Adoption of concrete standards directly based upon the representativeness principle is analytically appropriate and would ensure that jury selection systems are evaluated in terms of the underlying constitutional concerns.

Most of the unrepresentativeness in our jury systems is directly attributable to the unrepresentativeness of the source lists. Multiple lists are in use in several jurisdictions, and the methodology for easy and inexpensive implementation of multiple list systems is now available. Constitutional and statutory mandates concerning source lists must be enforced, or representativeness will be an empty generalization rather than a constitutional cornerstone.

Mr. KAIRYS. Maybe I should make another comment about Mr. Imlay's statement.

He said two contradictory things that are very important. I think these get at what the Judicial Conference seems to care about—which is the question of challenges.

First he said that the challenges were the basis for the proposed amendment. When you ask him about what challenges there were, he really said that there is not a lot of litigation on this. There really is not a significant amount.

He pointed immediately to the Colorado situation. I think that is a very good and important example because of the way the district court resolved the problem by going to multiple lists. I think that is the appropriate way to resolve it, rather than trying to stop people from challenging unrepresentativeness.

Senator DECONCINI. If we substituted, or did away with, "presumption" would you suggest any language to be used? Do you think it ought to be mandated that there are to be specific multiple lists, or would you refer to the Uniform Jury Selection Act?

Mr. KAIRYS. I would favor the language from the Uniform Act. I do not think you should state specific lists because there is too much variance. In Alaska, they use the fish and game lists. That takes advantage of a local resource. There are a lot of people on it.

I think we should allow that kind of flexibility. It is very difficult, statistically and sociologically, to make a uniform findings, just as it is difficult to say the voter list is representative or unrepresentative all across the country.

Senator DECONCINI. Would you specifically suggest that the language would say something to the effect that it should be the district's prerogative to use multiple lists, or whichever ones they want to?

Mr. KAIRYS. Yes. The prerogative to choose the lists in conjunction with the Uniform Jury Selection Act language, which mandates multiple lists, would do it.

It would have to be made clear that each District must examine the available lists and determine the most representative and inclusive combination. I have talked to several Federal district court clerks about this. I have yet to find one of them—and these are the clerks in charge of the jury process—who even considered, in drawing up their jury selection plan, or in designing their system, using multiple lists. They all assume that voter lists are all right. Of course, the proposed presumption would make them assume that even more.

They are under the impression that all they have to do to satisfy the act is to use voter lists. I think we should discourage that and make them realize that this is an issue they have to deal with. If they want to eliminate the challenges, then this is one way to do it. They can make the system work right. And there will not be challenges.

The other thing that I think Congress could do, which deals not only with source lists, but with the whole problem, is to adopt concrete standards of representativeness. I think that one of the main problems in terms of challenges and the court decisions is that the act of 1968 leaves the establishment of standards of represenativeness up to the courts. The courts have, I think, failed in taking up that duty.

There are absolutely no concrete standards of representativeness.

If Congress set standards, then two things, I think, would happen

concerning the challenges. First of all, the lawyers would know, without any doubt, whether they had a basis for a challenge. Either the system they are thinking of challenging meets criteria that Congress set, or it does not.

Second, the court administrators would know when their particular system is unlawful, and when it is not. When they do their yearly report, or however frequently they are supposed to do it, it will come to their attention whether they are in violation of the law.

That would have the effect of minimizing challenges. And our juries would be representative. That is, of course, most important.

Senator WALLOP. That concerns me, however. It is a kind of "high fallutin" idea that looks pretty—to adopt concrete standards of representativeness—but I would suggest that that would be extremely difficult to do in language painted by the Congress that would go across the land, with all the mysterious differences that exist between States.

It seems to me that there ought to be a mandate for representativeness, and leave that open for challenge within the district.

I get awfully nervous when Congress thinks it knows some set of words that covers every instance in this country. My experience shows exactly the opposite to be the truth.

Mr. KAIRYS. I understand that, Senator. I think that is something, obviously, that would have to be considered.

The thing is this. In this whole area, no one really knows what is representative and what is not representative because neither the courts nor Congress have defined it.

I think you could adopt standards that really do not tell them which lists to use or how to do it, but state that the system cannot be out of whack more than x amount as to any cognizable class.

Senator WALLOP. Again, I have problems with that in a State like mine which does not have great numbers of minority groups. Those that there are frequently do not wish to be, and will use any excuse not to get on a jury. To be unable to empanel a jury because you cannot come up with—you know, quota systems are already difficult to work with. If Congress wants to do anything, I think it ought to oblige itself of some kind of philosophical expression of representatives. But I would hate to have us try to draw language that would fit right across the country. By that, I mean specific language.

Mr. KAIRYS. I understand that.

Mr. SCHULMAN. I wonder if I could address that issue?

Senator DECONCINI. Certainly.

Mr. SCHULMAN. New York State has just adopted language. The jury project has been deeply involved with the presiding justices of the various divisions and the jury clerks in trying to work something out. Our experience has been that the bureaucracy is so resistant to trying new techniques that, in spite of the legislation that is there as a result of the last legislature, we keep on finding before us the old system. The old procedures are there that we know are going to produce exactly the same result.

So the problem becomes, how do you implement in the face of a bureaucracy that is inured with tradition and has very little give to it?

So there is the problem that you raise, Senator Wallop, and the problem that we experience in trying to make that mandate real.

Senator WALLOP. I can appreciate that. The medicine might cure the cold, but it might take care of the rest of you as well.

This is basically a conservative attitude of trying to paint too broad a stroke across the country and hopefully that language will fit every instance, but I am quite certain that whatever you drew up for New York would land on Wyoming and everyone would start importing people to meet the various quotas. [Laughter.]

Mr. SCHULMAN. We are not arguing that what is good for New York is good for Wyoming, but what we are saying is that there are criteria which are now available as to how to represent, given the real community and given the variations, and we think that material ought to be drawn upon, if necessary, by the Congress. This could be drawn upon by local officials, but far too often it is not.

Here are these data bases which are available and could make this more effective.

Mr. KAIRYS. Let me add one thing. The word "quota" is loaded these days. I think the idea, or the quota aspect, of what I am saying is already embodied in the act. The act says it should be representative of a cross section. The Constitution has been read to say it should be representative.

What we are saying is not really to put any further quotas on, but to define the deviations from that that are allowable, and the deviations that are not allowable. That is really what we are suggesting.

Senator WALLOP. I have no quarrel with it, but I would like to see the language first.

Senator DECONCINI. You certainly will, if we adopt anything.

Mr. KAIRYS. We have suggested some language in the article that has been made a part of the record.

Senator DECONCINI. Gentlemen, we thank you very much.

Your testimony has been very thought provoking. We appreciate it, and we appreciate your demonstration of keen awareness of this problem and the advocacies that you have put forward on behalf of leaving it like it is.

The hearing will adjourn.

[Whereupon, at 11:15 a.m., the subcommittee adjourned.]

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